SUPREME COURT
OF THE UNITED STATES

No. 22O137 ORG
Title: Montana, Plaintiff
v
Wyoming and North Dakota
Docketed: February 2, 2007

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jan 30 2007	Documents filed with the Special Master are available at www.stanford.edu/dept/law/mvn/
Jan 31 2007	Motion for leave to file a bill of complaint filed.
Apr 3 2007	Brief of respondent Wyoming in opposition filed.
Apr 16 2007	Reply of Montana, Plaintiff filed. (Distributed)
Apr 17 2007	DISTRIBUTED for Conference of May 10, 2007.
May 14 2007	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Jan 2 2008	Brief amicus curiae of United States filed.
Jan 16 2008	DISTRIBUTED for Conference of February 15, 2008.
Feb 19 2008	The Motion for leave to file a bill of complaint is GRANTED. Wyoming is allowed 45 days within which to file a motion to dismiss, in the nature of a motion under Rule 12(b)(6), Federal Rules of Civil Procedure. The plaintiff is allowed 30 days to file a response to the motion. A reply, if any, shall be filed within 10 days after the response is filed.
Apr 2 2008	The briefing schedule is extended to reflect the following due dates: Wyoming's motion to dismiss due April 4, 2008; amici briefs supporting Wyoming due April 25, 2008; Montana's response due May 9, 2008; amici briefs supporting Montana due May 16, 2008; Wyoming's reply due May 27, 2008.
Apr 4 2008	Motion to Dismiss Bill of Complaint filed by respondent Wyoming (CL Page 158)
Apr 25 2008	Motion for leave to file amicus brief filed by Anadarko Petroleum Corporation.
May 9 2008	Response to Wyoming's Motion to Dismiss Bill of Complaint from Montana, Plaintiff filed.
May 16 2008	Brief amicus curiae of United States filed.
May 16 2008	Brief amicus curiae of Northern Cheyenne Tribe filed.
May 27 2008	Reply of respondent Wyoming in support of its Motion to Dismiss Bill of Complaint filed.
Jun 3 2008	Motion DISTRIBUTED for Conference of June 19, 2008.
Jun 11 2008	Motion DISTRIBUTED for Conference of September 29, 2008.
Oct 6 2008	DISTRIBUTED for Conference of October 10, 2008.
Oct 14 2008	DISTRIBUTED for Conference of October 17, 2008.
Oct 20 2008	Motion to Dismiss Bill of Complaint referred to the Special Master.
Oct 20 2008	Motion for leave to file amicus brief filed by Anadarko Petroleum Corporation referred to the Special Master.
Oct 20 2008	BARTON H. THOMPSON, Esquire, of Stanford, California, is appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses, to issue subpoenas, and to take such evidence as may be introduced and such as he may deem it necessary to call for. The Special Master is directed to submit Reports as he may deem appropriate. The compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic and clerical assistants, the cost of printing his Reports, and all other proper expenses, including travel expenses, shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.
Jul 1 2009	Motion for allowance of fees and expenses filed by Special Ma (CL Page 162)

Jul 15 2009	Motion DISTRIBUTED for Conference of September 29, 2009.
Oct 5 2009	The motion of the Special Master for allowance of fees and reimbursement of expenses is granted, and the Special Master is awarded a total of $40,808.96 for the period October 20, 2008, through June 12, 2009, to be paid equally by the parties.
Feb 9 2010	First Interim Report of the Special Master filed.
Mar 8 2010	The Report of the Special Master is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed within 45 days. Replies, if any, with supporting briefs, may be filed within 30 days. Sur-replies, if any, with supporting briefs, may be filed within 30 days.
Apr 15 2010	Order extending time to file Exceptions to and including May 13, 2010. Reply Briefs, if any are now due June 15, 2010 and Sur-replies are due July 15, 2010.
May 13 2010	Montana's Exception and Brief to the First Interim Report of the Special Master Filed.
May 20 2010	Brief amicus curiae of Northern Cheyenne Tribe filed.
Jun 15 2010	Reply to Montana's Exception filed by Wyoming.
Jun 22 2010	Brief amicus curiae of United States filed.
Jun 22 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Jul 12 2010	Motion for allowance of fees and expenses filed by Special Master. (CL Page 163)
Jul 14 2010	Sur-Reply filed by Montana.
Jul 21 2010	Exceptions DISTRIBUTED for Conference of September 27, 2010.
Jul 28 2010	Motion DISTRIBUTED for Conference of September 27, 2010.
Oct 4 2010	DISTRIBUTED for Conference of October 8, 2010.
Oct 12 2010	Motion for allowance of fees and expenses The motion of the Special Master for allowance of fees and reimbursement of expenses is granted, and the Special Master is awarded a total of $72,008.74 for the period June 13, 2009, through July 9, 2010, to be paid equally by the Montana and Wyoming. Justice Kagan took no part in the consideration or decision of this motion.
Oct 12 2010	The first exception to the Special Master' s First Interim Report is set for oral argument in due course. The second exception is recommitted to the Special Master. Wyoming's motion to dismiss is denied. Justice Kagan took no part in the consideration or decision of these exceptions and this motion.
Oct 12 2010	Motion DISTRIBUTED for Conference of October 15, 2010.
Oct 18 2010	Montana's motion for partial summary judgment is granted in part and denied in part without prejudice in accordance with the Special Master's First Interim Report, and Anadarko Petroleum's motion for leave to intervene is denied. Justice Kagan took no part in the consideration or decision of these motions.
Nov 1 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no part in the condsideration or decision of this motion.
Nov 8 2010	SET FOR ARGUMENT ON Monday, January 10, 2011.
Nov 12 2010	CIRCULATED.
Jan 11 2011	Argued. For plaintiff: Steve Bullock, Attorney General, Helena, Mont. For defendant Wyoming: Peter Kenneth Michael, Senior Assistant Attorney General, Wyo.; and William M. Jay, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)

No. 137, Original

JAN 31 2007

In The
Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT, BILL OF COMPLAINT, AND BRIEF IN SUPPORT

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January 2007

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No. _____, Original

In The
Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Comes now the State of Montana, by and through the Attorney General of Montana, Mike McGrath, pursuant to the authority vested in him under the laws of Montana, and moves the Court for leave to file the accompanying Bill of Complaint.

In support of its Motion, the State of Montana asserts that its claims arise from an interstate water compact, its claims are serious and dignified, and there is no alternative forum in which adequate relief may be had. For the reasons more fully stated in the accompanying Brief in

Support, the Motion of the State of Montana for Leave to File Bill of Complaint should be granted.

Respectfully submitted,

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January 2007

No. _____, Original

In The
Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

BILL OF COMPLAINT

The State of Montana, by and through its Attorney General, Mike McGrath, brings this suit against Defendants the State of Wyoming and the State of North Dakota, and for its cause of action states:

1. The Court has exclusive and original jurisdiction of this suit under Article III, Section 2, Clause 2, of the Constitution of the United States and Title 28, Section 1251(a), of the United States Code.

2. The Tongue and Powder Rivers are interstate tributaries of the Yellowstone River. They originate in the State of Wyoming and flow generally northward into the State of Montana, where they join the mainstem of the Yellowstone River. The Yellowstone River flows generally

northeast across the State of Montana and joins the Missouri River just after crossing into the State of North Dakota.

3. The waters of the Tongue and Powder Rivers have been equitably divided and apportioned among the States of Montana, North Dakota, and Wyoming by the Yellowstone River Compact. The Yellowstone River Compact (Compact) was negotiated pursuant to Article I, Section 10, Clause 3, of the Constitution of the United States and pursuant to the Act of Congress of June 2, 1949, 63 Stat. 152. The Compact was entered into by the States of Montana, North Dakota, and Wyoming on the basis of an agreement reached on December 8, 1950. Each of the States subsequently ratified the Compact by legislative enactment. Act of Feb. 13, 1951, ch. 39, 1951 Mont. Laws 58 (codified at Mont. Code Ann. § 85-20-101 (2005)); Act of Mar. 7, 1951, ch. 339, 1951 N. D. Laws 505 (codified at N.D. Cent. Code § 61-23-01 (2005)); Act of Jan. 27, 1951, ch. 10, 1951 Wyo. Sess. Laws 7 (codified at Wyo. Stat. Ann. § 41-12-601 (2005)). The consent of the Congress of the United States to the Compact was granted by Act of October 10, 1951, 65 Stat. 663. The Compact is reprinted in the Appendix to this Bill of Complaint.

4. The State of North Dakota is named as a party to this cause of action as a signatory State to the Compact.

5. The waters of the Tongue and Powder River Basins are part of the Yellowstone River System and the Yellowstone River Basin as defined in Article II of the Compact.

6. The Compact was intended to effect and did effect a full equitable division and apportionment of all the waters of the Tongue and Powder River Basins.

7. Article V of the Compact apportions among the compacting States the waters of the Tongue and Powder Rivers that were in use in each State as of January 1, 1950, and for which appropriative water rights existed in each State as of that time. Article V also allocates the unused and unappropriated waters of the Tongue and Powder Rivers as of January 1, 1950 as shall be necessary to provide supplemental water for existing rights. Finally, Article V allocates any remaining water of the Tongue and Powder Rivers by specified percentages.

8. Wyoming refuses to curtail consumption of the waters of the Tongue and Powder Rivers in excess of Wyoming's consumption of such waters existing as of January 1, 1950, whenever the amount of water necessary to satisfy Montana's uses of such waters existing as of that date is not passing the Wyoming-Montana stateline, in violation of Montana's rights under Article V of the Compact.

9. Since January 1, 1950, Wyoming has allowed construction and use of new and expanded water storage facilities in the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact.

10. Since January 1, 1950, Wyoming has allowed new acreage to be put under irrigation in the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact.

11. Since January 1, 1950, Wyoming has allowed the construction and use of groundwater wells for irrigation and for other uses and has allowed the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact.

12. Since January 1, 1950, Wyoming has allowed the consumption of water on existing irrigated acreage in the Tongue and Powder River Basins to be increased in violation of Montana's rights under Article V of the Compact.

13. By undertaking and allowing the aforementioned actions, the State of Wyoming has depleted and is threatening further to deplete the waters of the Tongue and Powder Rivers allocated to the State of Montana under Article V of the Compact.

14. By depleting the waters allocated to the State of Montana, the State of Wyoming has injured the State of Montana and its water users.

15. Unless relief is granted by this Court, water use in the State of Wyoming in excess of its equitable share of the waters of the Tongue and Powder Rivers will continue and increase, resulting in substantial and irreparable injury to the State of Montana and its water users.

16. The State of Wyoming refuses to comply with Article V of the Yellowstone River Compact with respect to the waters of the Tongue and Powder Rivers, despite requests by the State of Montana that it do so.

17. The State of Montana has no adequate remedy at law to enforce its rights to the waters of the Tongue and Powder Rivers against the State of Wyoming.

18. The State of Montana has no sufficient remedy for the aforementioned violations of the Yellowstone River Compact by the State of Wyoming except by invoking the Court's original jurisdiction in this proceeding.

WHEREFORE, the State of Montana respectfully prays that the Court:

A. Declare the rights of the State of Montana to the waters of the Tongue and Powder Rivers pursuant to the Yellowstone River Compact;

B. Issue its Decree commanding the State of Wyoming in the future to deliver the waters of the Tongue and Powder Rivers in accordance with the provisions of the Yellowstone River Compact;

C. Award to the State of Montana all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the State of Montana as a result of the State of Wyoming's past and continuing violations of the Yellowstone River Compact with respect to the waters of the Tongue and Powder River Basins; and

D. Grant such costs and other relief as the Court deems just and proper.

Respectfully submitted,

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**Counsel of Record*

January 2007

Appendix to Bill of Complaint

Yellowstone River Compact
As Enacted by Congress
65 Stat. 663 (1951)

AN ACT

Granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress is hereby given to an interstate compact relating to the waters of the Yellowstone River which was signed (after negotiations in which a representative of the United States duly appointed by the President participated) by the Commissioners for the States of Montana, North Dakota, and Wyoming on December 8, 1950, at Billings, Montana, and which was thereafter ratified by the legislatures of each of the States aforesaid as provided by Public Law 83, Eighty-first Congress, approved June 2, 1949, which compact reads as follows:

YELLOWSTONE RIVER COMPACT

The State of Montana, the State of North Dakota, and the State of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone

National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, acknowledging that in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin the great importance of water for irrigation in the signatory States shall be recognized, have resolved to conclude a Compact as authorized under the Act of Congress of the United States of America, approved June 2, 1949 (Public Law 83, 81st Congress, First Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective Commissioners:

For the State of Montana:

Fred E. Buck
A. W. Bradshaw
H. W. Bunston
John Herzog
John M. Jarussi
Ashton Jones
Chris Josephson
A. Wallace Kingsbury
P. F. Leonard
Walter M. McLaughlin
Dave M. Manning
Joseph Muggli
Chester E. Onstad
Ed F. Parriott
R. R. Renne
Keith W. Trout

For the State of North Dakota:

I. A. Acker
Einar H. Dahl
J. J. Walsh

For the State of Wyoming:

L. C. Bishop
Earl T. Bower
J. Harold Cash
Ben F. Cochrane
Ernest J. Goppert
Richard L. Greene
E. C. Gwillim
E. J. Johnson
Lee E. Keith
N. V. Kurtz
Harry L. Littlefield
R. E. McNally
Will G. Metz
Mark N. Partridge
Alonzo R. Shreve
Charles M. Smith
Leonard F. Thornton
M. B. Walker

who, after negotiations participated in by R. J. Newell, appointed as the representative of the United States of America, have agreed upon the following articles, to wit:

ARTICLE I

A. Where the name of a State is used in this Compact, as a party thereto, it shall be construed to include the individuals, corporations, partnerships, associations, districts, administrative departments, bureaus, political subdivisions, agencies, persons, permittees, appropriators, and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State.

B. Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory State and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State, shall be subject to the terms of this Compact. Where the singular is used in this article, it shall be construed to include the plural.

ARTICLE II

A. The State of Montana, the State of North Dakota, and the State of Wyoming are hereinafter designated as "Montana," "North Dakota," and "Wyoming," respectively.

B. The terms "Commission" and "Yellowstone River Compact Commission" mean the agency created as provided herein for the administration of this Compact.

C. The term "Yellowstone River Basin" means areas in Wyoming, Montana, and North Dakota drained by the Yellowstone River and its tributaries, and includes the area in Montana known as Lake Basin, but excludes those lands lying within Yellowstone National Park.

D. The term "Yellowstone River System" means the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River near Buford, North Dakota, except those portions thereof which are within or contribute to the flow of streams within the Yellowstone National Park.

E. The term "Tributary" means any stream which in a natural state contributes to the flow of the Yellowstone River, including interstate tributaries and tributaries

thereof, but excluding those which are within or contribute to the flow of streams within the Yellowstone National Park.

F. The term "Interstate Tributaries" means the Clarks Fork, Yellowstone River; the Bighorn River (except Little Bighorn River); the Tongue River, and the Powder River, whose confluences with the Yellowstone River are respectively at or near the city (or town) of Laurel, Big Horn, Miles City, and Terry, all in the State of Montana.

G. The terms "Divert" and "Diversion" mean the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken.

H. The term "Beneficial Use" is herein defined to be that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man.

I. The term "Domestic Use" shall mean the use of water by an individual, or by a family unit or household for drinking, cooking, laundering, sanitation, and other personal comforts and necessities; and for the irrigation of a family garden or orchard not exceeding one-half acre in area.

J. The term "Stock Water Use" shall mean the use of water for livestock and poultry.

ARTICLE III

A. It is considered that no Commission or administrative body is necessary to administer this Compact or divide the waters of the Yellowstone River Basin as

between the States of Montana and North Dakota. The provisions of this Compact, as between the States of Wyoming and Montana, shall be administered by a Commission composed of one representative from the State of Wyoming and one representative from the State of Montana, to be selected by the Governors of said States as such States may choose, and one representative selected by the Director of the United States Geological Survey or whatever Federal agency may succeed to the functions and duties of that agency, to be appointed by him at the request of the States to sit with the Commission and who shall, when present, act as Chairman of the Commission without vote, except as herein provided.

B. The salaries and necessary expenses of each State representative shall be paid by the respective State; all other expenses incident to the administration of this Compact not borne by the United States shall be allocated to and borne one-half by the State of Wyoming and one-half by the State of Montana.

C. In addition to other powers and duties herein conferred upon the Commission and the members thereof, the jurisdiction of the Commission shall include the collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this Compact, and recommendations to such States upon matters connected with the administration of this Compact, and the Commission may employ such services and make such expenditures as reasonable and necessary within the limit of funds provided for that purpose by the respective States and shall compile a report for each year ending September 30 and transmit it to the Governors of the signatory States on or before December 31 of each year.

D. The Secretary of the Army; the Secretary of the Interior; the Secretary of Agriculture; the Chairman, Federal Power Commission; the Secretary of Commerce, or comparable officers of whatever Federal agencies may succeed to the functions and duties of these agencies and such other Federal officers and officers of appropriate agencies of the signatory States having services or data useful or necessary to the Compact Commission, shall cooperate, ex officio, with the Commission in the execution of its duty in the collection, correlation, and publication of records and data necessary for the proper administration of the Compact; and these officers may perform such other services related to the Compact as may be mutually agreed upon with the Commission.

E. The Commission shall have power to formulate rules and regulations and to perform any act which it may find necessary to carry out the provisions of this Compact, and to amend such rules and regulations. All such rules and regulations shall be filed in the office of the State Engineer of each of the signatory States for public inspection.

F. In case of the failure of the representatives of Wyoming and Montana to unanimously agree on any matter necessary to the proper administration of this Compact, then the member selected by the Director of the United States Geological Survey shall have the right to vote upon the matters in disagreement and such points of disagreement shall then be decided by a majority vote of the representatives of the States of Wyoming and Montana and said member selected by the Director of the United States Geological Survey, each being entitled to one vote.

G. The Commission herein authorized shall have power to sue and be sued in its official capacity in any Federal Court of the signatory States and may adopt and use an official seal which shall be judicially noticed.

ARTICLE IV

The Commission shall itself, or in conjunction with other responsible agencies, cause to be established, maintained, and operated such suitable water gaging and evaporation stations as it finds necessary in connection with its duties.

ARTICLE V

A. Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

B. Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory State such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation, and the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows:

1. Clarks Fork, Yellowstone River

   a. To Wyoming ---------- 60%

      To Montana---------- 40%

   b. The point of measurement shall be below the last diversion from Clarks Fork above Rock Creek.

2. Bighorn River (Exclusive of Little Bighorn River)

   a. To Wyoming ---------- 80%

      To Montana---------- 20%

   b. The point of measurement shall be below the last diversion from the Bighorn River above its junction with the Yellowstone River, and the inflow of the Little Bighorn River shall be excluded from the quantity of water subject to allocation.

3. Tongue River

   a. To Wyoming ---------- 40%

      To Montana---------- 60%

   b. The point of measurement shall be below the last diversion from the Tongue River above its junction with the Yellowstone River.

4. Powder River (including the Little Powder River)

   a. To Wyoming ---------- 42%

      To Montana---------- 58%

   b. The point of measurement shall be below the last diversion from the Powder River above its junction with the Yellowstone River.

C. The quantity of water subject to the percentage allocations, in Paragraph B 1, 2, 3, and 4 of this Article V, shall be determined on an annual water year basis

measured from October 1st of any year through September 30th of the succeeding year. The quantity to which the percentage factors shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:

1. The total diversions, in acre-feet, above the point of measurement, for irrigation, municipal, and industrial uses in Wyoming and Montana developed after January 1, 1950, during the period from October 1st to that given date;

2. The net change in storage, in acre-feet, in all reservoirs in Wyoming and Montana above the point of measurement completed subsequent to January 1, 1950, during the period from October 1st to that given date;

3. The net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950, during the period October 1st to that given date;

4. The quantity of water, in acre-feet, that passed the point of measurement in the stream during the period from October 1st to that given date.

D. All existing rights to the beneficial use of waters of the Yellowstone River in the States of Montana and North Dakota, below Intake, Montana, valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact. During the period May 1 to September 30, inclusive, of each year, lands within Montana and North Dakota shall be entitled to the beneficial use of the flow of waters of the Yellowstone River below Intake, Montana, on

a proportionate basis of acreage irrigated. Waters of tributary streams, having their origin in either Montana or North Dakota, situated entirely in said respective States and flowing into the Yellowstone River below Intake, Montana, are allotted to the respective States in which situated.

E. There are hereby excluded from the provisions of this Compact:

1. Existing and future domestic and stock water uses of water: *Provided,* That the capacity of any reservoir for stock water so excluded shall not exceed 20 acre-feet;

2. Devices and facilities for the control and regulation of surface waters.

F. From time to time the Commission shall reexamine the allocations herein made and upon unanimous agreement may recommend modifications therein as are fair, just, and equitable, giving consideration among other factors to:

Priorities of water rights;
Acreage irrigated;
Acreage irrigable under existing works; and
Potentially irrigable lands.

ARTICLE VI

Nothing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.

ARTICLE VII

A. A lower signatory State shall have the right, by compliance with the laws of an upper signatory State, except as to legislative consent, to file application for and receive permits to appropriate and use any waters in the Yellowstone River System not specifically apportioned to or appropriated by such upper State as provided in Article V; and to construct or participate in the construction and use of any dam, storage reservoir, or diversion works in such upper State for the purpose of conserving and regulating water that may be apportioned to or appropriated by the lower State: *Provided*, That such right is subject to the rights of the upper State to control, regulate, and use the water apportioned to and appropriated by it: *And provided further*, That should an upper State elect, it may share in the use of any such facilities constructed by a lower State to the extent of its reasonable needs upon assuming or guaranteeing payment of its proportionate share of the cost of the construction, operation, and maintenance. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

B. Each claim hereafter initiated for an appropriation of water in one signatory State for use in another signatory State shall be filed in the Office of the State Engineer of the signatory State in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the State Engineer of the signatory State in which the water is to be used.

C. Appropriations may hereafter be adjudicated in the State in which the water is diverted, and where a

portion or all of the lands irrigated are in another signatory State, such adjudications shall be confirmed in that State by the proper authority. Each adjudication is to conform with the laws of the State where the water is diverted and shall be recorded in the County and State where the water is used.

D. The use of water allocated under Article V of this Compact for projects constructed after the date of this Compact by the United States of America or any of its agencies or instrumentalities, shall be charged as a use by the State in which the use is made: *Provided*, That such use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State.

ARTICLE VIII

A lower signatory State shall have the right to acquire in an upper State by purchase, or through exercise of the power of eminent domain, such lands, easements, and rights-of-way for the construction, operation, and maintenance of pumping plants, storage reservoirs, canals, conduits, and appurtenant works as may be required for the enjoyment of the privileges granted herein to such lower State. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

ARTICLE IX

Should any facilities be constructed by a lower signatory State in an upper signatory State under the provisions of Article VII, the construction, operation, repairs,

and replacements of such facilities shall be subject to the laws of the upper State. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

ARTICLE X

No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States. In the event water from another river basin shall be imported into the Yellowstone River Basin or transferred from one tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefor in determining its share of the water apportioned in accordance with Article V herein.

ARTICLE XI

The provisions of this Compact shall remain in full force and effect until amended in the same manner as it is required to be ratified to become operative as provided in Article XV.

ARTICLE XII

This Compact may be terminated at any time by unanimous consent of the signatory States, and upon such termination all rights then established hereunder shall continue unimpaired.

ARTICLE XIII

Nothing in this Compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, in any Federal Court or the United States Supreme Court, for the protection of any right under this Compact or the enforcement of any of its provisions.

ARTICLE XIV

The physical and other conditions characteristic of the Yellowstone River and peculiar to the territory drained and served thereby and to the development thereof, have actuated the signatory States in the consummation of this Compact, and none of them, or the United States of America by its consent and approval, concedes thereby the establishment of any general principle or precedent with respect to other interstate streams.

ARTICLE XV

This Compact shall become operative when approved by the Legislature of each of the signatory States and consented to and approved by the Congress of the United States.

ARTICLE XVI

Nothing in this Compact shall be deemed:

(a) To impair or affect the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such compact, any rights or powers of

the United States of America, its agencies, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin nor its capacity to acquire rights in and to the use of said waters;

(b) To subject any property of the United States of America, its agencies, or instrumentalities to taxation by any State or subdivision thereof, or to create an obligation on the part of the United States of America, its agencies, or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any State or political subdivision thereof, State agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

(c) To subject any property of the United States of America, its agencies, or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the Compact.

ARTICLE XVII

Should a Court of competent jurisdiction hold any part of this Compact to be contrary to the constitution of any signatory State or of the United States of America, all other severable provisions of this Compact shall continue in full force and effect.

ARTICLE XVIII

No sentence, phrase, or clause in this Compact or in any provision thereof, shall be construed or interpreted to divest any signatory State or any of the agencies or officers of such States of the jurisdiction of the water of each State as apportioned in this Compact.

In Witness Whereof the Commissioners have signed this Compact in quadruplicate original, one of which shall be filed in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each signatory State.

Done at the City of Billings in the State of Montana, this 8th day of December, in the year of our Lord, One Thousand Nine Hundred and Fifty.

Commissioners for the State of Montana:

Fred E. Buck	/s/ Fred E. Buck
A. W. Bradshaw	/s/ A. W. Bradshaw
H. W. Bunston	/s/ H. W. Bunston
John Herzog	/s/ John Herzog
John M. Jarussi	/s/ John M. Jarussi
Ashton Jones	/s/ Ashton Jones
Chris Josephson	/s/ Chris Josephson
A. Wallace Kingsbury	/s/ A. Wallace Kingsbury
P. F. Leonard	/s/ P. F. Leonard
Walter M. McLaughlin	/s/ Walter M. McLaughlin
Dave M. Manning	/s/ Dave M. Manning
Joseph Muggli	/s/ Joseph Muggli
Chester E. Onstad	/s/ Chester E. Onstad
Ed F. Parriott	/s/ Ed F. Parriott
R. R. Renne	/s/ R. R. Renne
Keith W. Trout	/s/ Keith W. Trout

Commissioners for the State of North Dakota:

I. A. Acker	/s/ I. A. Acker
Einar H. Dahl	/s/ Einar H. Dahl
J. J. Walsh	/s/ J. J. Walsh

Commissioners for the State of Wyoming:

L. C. Bishop	/s/ L. C. Bishop
Earl T. Bower	/s/ Earl T. Bower
J. Harold Cash	/s/ J. Harold Cash
Ben F. Cochrane	/s/ Ben F. Cochrane
Ernest J. Goppert	/s/ Ernest J. Goppert
Richard L. Greene	/s/ Richard L. Greene
E. C. Gwillim	/s/ E. C. Gwillim
E. J. Johnson	/s/ E. J. Johnson
Lee E. Keith	/s/ Lee E. Keith
N. V. Kurtz	/s/ N. V. Kurtz
Harry L. Littlefield	/s/ Harry L. Littlefield
R. E. McNally	/s/ R. E. McNally
Will G. Metz	/s/ Will G. Metz
Mark N. Partridge	/s/ Mark N. Partridge
Alonzo R. Shreve	/s/ Alonzo R. Shreve
Charles M. Smith	/s/ Charles M. Smith
Leonard F. Thornton	/s/ Leonard F. Thornton
M. B. Walker	/s/ M. B. Walker

"I have participated in the negotiation of this Compact and intend to report favorably thereon to the Congress of the United States.

/s/ R. J. Newell
R. J. Newell,

Representative of the United States of America."

SEC. 2. The right to alter, amend or repeal section 1 of this Act is expressly reserved. This reservation shall not be construed to prevent the vesting of rights to the use of water pursuant to applicable law and no alteration, amendment, or repeal of section 1 of this Act shall be held to affect rights so vested.

Approved October 30, 1951.

4-3-2007

No. 137, Original

In The
Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING and
STATE OF NORTH DAKOTA,

Defendants.

WYOMING'S BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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April 2007

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STATEMENT OF THE CASE

The State of Wyoming ("Wyoming") submits this brief in opposition to the State of Montana's ("Montana") Motion for Leave to File Bill of Complaint. Montana's claims lack sufficient seriousness or dignity to justify this Court's exercise of its original jurisdiction. Montana's allegations that Wyoming has developed groundwater, sprinkler irrigation systems, new reservoirs, and new irrigated lands since 1950 are allegations of conduct that does not violate the Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951) (Appendix A to Montana's Proposed Bill of Complaint) ("the Compact," and cited as "YRC"). Montana also fails to adequately allege that it has suffered injury caused by any of this post-1950 development in Wyoming.

Wyoming also asserts that the Yellowstone River Compact Commission ("Compact Commission") is an adequate alternative forum to which this Court should refer Montana for fact development. Wyoming has shared with Montana much of its data on its water use in the Tongue and Powder River drainages, and will continue to do so. The Compact Commission has the authority to ensure full disclosure. Had Montana gathered the facts before prematurely filing this suit, it would have discov ered that it has no factual or legal basis for its claims.

STATEMENT OF FACTS MATERIAL TO THE QUESTIONS PRESENTED

A. Introduction

The Yellowstone River Compact became effective on October 30, 1951 with Congress's consent. YRC, *supra*, 63

Stat. 663. Montana bases its claims on the practices of Wyoming water users within the drainages of the Tongue and Powder Rivers, two of the four "Interstate Tributaries" to the Yellowstone River that are governed by the Compact. (Proposed Bill of Complaint 1-5), YRC art. II, § F. Montana has made no allegations regarding any Compact violations on the other two Interstate Tributaries, the Clark's Fork of the Yellowstone River and the Big Horn River. Montana's legal theories are based on Article V of the Compact, which creates a three-tiered water allocation scheme.

The first tier is found in Section A of Article V, where the states agreed that surface water rights to water from Yellowstone River System (which includes the Tongue and Powder and their tributaries), would continue to be enjoyed under each state's water laws as those laws existed as of January 1, 1950. Wyoming agrees with Montana that these pre-1950 rights are to be administered within each state based only on intra-state prior appropriation. Montana's Brief in Support of Motion for Leave to File Bill of Complaint 19 ("Mont. Br."). Therefore, this Court need not consider the Compact's first tier allocation under Section A of Article V.

The second and third tiers of the Compact's water allocation scheme between Montana and Wyoming are combined in Section B of Article V. The second tier is in the first clause of Section B, and it involves supplemental supply water rights. These are post-1950 water rights through which irrigators in Montana and Wyoming may divert new water to supplement the water that they

already apply to their lands through pre-1950 original water rights.[1]

Montana contends that supplemental rights in Montana and Wyoming are to be allocated between users in the two states based on the users' seniority of use applied across the state line. (Mont. Br. 13) While Wyoming disagrees with Montana on this theoretical issue, the issue is not ripe for determination in this case because Montana never alleges in its proposed Bill of Complaint or in its brief that its users with supplemental rights have actually suffered any injury based on seniority issues. In fact, Montana has not even specifically alleged that it has any users with post-1950 supplemental rights. Therefore, Wyoming will not further address in this brief whether the Compact created an interstate priority system for supplemental rights in the two states.

The issues that this Court should analyze for purposes of Montana's motion arise from the second clause of Section B, and Section C of Article V, which together establish the third tier of the Compact's water allocation scheme. These clauses apportion between the states water in the Interstate Tributaries on any particular date in excess of pre-1950 rights. Section B provides that such divertable surface flows may be diverted into storage or directly onto new lands that were opened to irrigation

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[1] Montana has no statute establishing how supplemental water rights are acquired in that state. However, Wyoming has recognized supplemental water supply rights since early in the last century, and the Wyoming Legislature passed a supplemental supply statute in 1965. Act of March 1, 1965, ch. 136, 1965 Wyo. Sess. Laws 372 (codified as WYO. STAT. § 41-3-113 (2005)).

after 1950 based on percentages.[2] On the Tongue, 60% of divertible flows are allocated to Montana and 40% to Wyoming, and on the combined Powder and Little Powder, 58% of the divertible flows are allocated to Montana and 42% to Wyoming.

Section C of Article V establishes a formula to determine whether each state remains within its percentage allocation on a particular date. The formula compares cumulative diversions in each state during the relevant water year (which begins on October 1) through the date in question, against a total divertible flow for the water year through the date in question. That total cumulative annual divertible flow consists of water that users in both states diverted from the relevant river, the net increase in the amount of water stored in reservoirs in both states, and the amount of water that flowed past the "point of measurement" near the end of the relevant river. YRC art. V, § C.1.-4.

In summary, Montana's case centers on the third tier of the Compact's allocation scheme, which specifically allows Montana and Wyoming water users with post-1950 water rights to divert and store available divertible flows as long as they do so within the bounds of Compact percentages.

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[2] Irrigators along the Tongue, Powder, and Little Powder typically make their diversions through headgates where canals and ditches intersect with the river, and through electric pumps in the river channels themselves.

B. Montana has Failed to Gather and Allege Adequate Facts to Support its Claims

In order to state a claim that Wyoming has violated the Compact's third tier allocation scheme with its post-1950 diversions, Montana must allege: (1) how those diversions would theoretically violate the Compact, (2) that such diversions have actually occurred on the Tongue, Powder and Little Powder Rivers, and (3) that such diversions have damaged Montana users. Montana has failed to allege such facts, and its failure should not be excused.

1. Wyoming Water Rights are in the Public Record and have been Readily Available to Montana

When the Yellowstone River Compact was adopted in 1951, both Wyoming and Montana were prior appropriation states, relying on the general principle of first in time, first in right, and they remain so today. There were some differences between the states' systems, however. In Montana, most water rights are "use rights" that users have perfected by simply putting water to use, without any public record notices or permits. *Dep't of State Lands v. Pettibone*, 702 P.2d 948, 951 (Mont. 1985). To correct this ad hoc system, the Montana Legislature passed the Montana Water Use Act of 1973, establishing water courts to conduct general adjudications of water rights on Montana's rivers. *See Pettibone*, 702 P.2d at 951 (discussing history of Montana water law). A Montana water court has completed an adjudication of rights on the Powder under the 1973 Act, and a general adjudication of the Tongue is underway in Montana. Until the general adjudication is completed on the Tongue, Montana will not be in a

position to prove for purposes of Compact allocations which of its diversions are for pre-1950 use rights as compared to post-1950 rights.

In contrast to Montana's system, Wyoming irrigators have always had to obtain a permit from the state engineer to put water from a particular source to beneficial use on specific land. WYO. STAT. § 41-4-501 (2006). The user would then divert water from that source, in the amount, through the means, and onto the lands, as set forth in the permit. After making his diversions, and putting the water to beneficial use, the permittee is compelled by statute to confirm his water right through a formal adjudication of his right before the Wyoming Board of Control.[1] WYO. STAT. §§ 41-4-511, 41-4-201 (2006); *see* M. Squillace, *A Critical Look at Wyoming Water Law*, 24 Land & Water L. Rev. 307, 309-310, 321-323 (1989). Wyoming's system was in place long before January 1, 1950, and continues today with little change. *Compare* Act of December 22, 1890, ch. 8, 1890-1891 Wyo. Sess. Laws 100-101 *with* WYO. STAT. § 41-4-511 (2006).

Under Wyoming's permitting system, Wyoming water rights documentation has for many years been publicly available at the Wyoming State Engineer's office, and since October of 2003 has been published on its website. Appendix B, Affidavit of Patrick T. Tyrrell, ¶ 6 ("App. B"). If Montana had so desired, it could have used this public documentation as a springboard from which to investigate

[1] The Wyoming Board of Control is comprised of the four division superintendents from each of Wyoming's four water divisions. WYO. CONST. art. 8, §§ 2, 4. The Wyoming State Engineer, who is the official with constitutional authority to generally supervise the waters of the state, presides at Board meetings. *Id.* art. 8, §§ 2, 5.

Wyoming's water use in drought years. Montana apparently failed to make such an investigation because it has failed to allege facts supporting its claim that Wyoming diversions have violated the Compact and damaged Montana. Instead, it has alleged only the potential that Wyoming diversions have done so. (Mont. Br. 16)

2. Wyoming and the Compact Commission have given Montana Ample Opportunity to Investigate its Claims

In the 56 years between the adoption of the Compact and Montana's filing in this Court, Montana and Wyoming water officials have shared their interpretations of various Compact provisions. Also, at annual Compact Commission meetings, and at meetings of the commission's technical committee, the states have shared data regarding water use in the four Interstate Tributaries covered by the Compact.

On May 18 of the drought year of 2004, Montana's water administrator Jack Stults complained in writing to Wyoming about lack of water in the Tongue and Powder for diversion by Montana's pre-1950 users.[4] App. B ¶ 7. Mr. Stults wrote a similar letter two years later, on July 18, 2006, when drought again plagued the Tongue and Powder Basins. *Id.* ¶ 12. Montana implies that when Wyoming responded to these written complaints, it simply took a hard line position on various Compact issues and that was

[4] Mr. Stults stated in his 2004 letter that Wyoming should cut off its pre-1950 water rights with priority dates junior to the priority dates of pre-1950 Montana water rights that were not being satisfied. As noted above, Montana has abandoned this argument for an interstate priority scheme under Article V, Section A of the Compact. (Mont. Br. 19)

that. On the contrary, after noting that drought was hurting very senior Wyoming irrigators as well as Montana irrigators, Wyoming State Engineer Tyrrell made detailed, timely responses in writing in both 2004 and 2006 in which he offered to share information and meet with Montana officials. *See* Appendices C and D. As a result, Montana and Wyoming officials met outside the auspices of the Yellowstone River Compact Commission and both states submitted information requests to each other. App. B ¶ 8.

In June of 2004, when Montana and Wyoming were fully engaged in these drought-induced discussions, the Wyoming State Engineer actually forwarded a copy of Wyoming's tabulation book to Montana's representatives. App. B ¶ 8. It contained a listing of all Wyoming water rights on the Tongue and Powder Rivers and their tributaries. In 2004 and 2005, Wyoming also gave Montana a copy of the hydrographer's annual reports that detailed the available actual Wyoming storage and use in the Tongue and Powder during those water years.[5] *Id.* ¶ 10. Also, in both 2004 and 2005, Mr. Tyrrell and his staff took the initiative to set up several work sessions of the Yellowstone Compact Commission Technical Committee so that Montana personnel could review Wyoming water rights and Wyoming's on-the-ground regulation of the Tongue River. App. B ¶¶ 8-10. Unfortunately, Montana cancelled both of the workshops. *Id.* ¶¶ 8, 10.

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[5] A hydrographer is a Wyoming state employee attached to a water division and under a division superintendent's supervision. The hydrographer travels his assigned drainages and keeps track of water use in many areas through documented measurements and estimates.

Montana fails to mention in its brief that, as a result of the 2004 correspondence and meetings that did take place, the states agreed to pursue funding for a joint study of the water rights and water uses on the Tongue River. The 2006 Wyoming Legislature appropriated $100,000.00 for the joint study, but Montana has never reciprocated. *Id.* ¶ 11. Montana has been aware for the last several years that Wyoming was prepared to fund the joint study if Montana would step up to the plate. Mr. Tyrrell reminded Montana of the funding in his letter of August 9, 2006, in which he responded to Mr. Stults's letter of July 28, 2006. App. D at D-3. Also, Montana's legislature considered appropriating its $100,000 share for the joint study as late as February of 2007, but instead turned its attention to funding this case.

In his August 9, 2006 letter, Mr. Tyrrell again offered to meet with Montana representatives to go over facts and issues. App. D at D-3. Instead of taking him up on this offer, Montana waited until just before the Yellowstone River Compact Commission meeting on December 6, 2006, and circulated a resolution for consideration by the commission. (App. B to Mont. Br.) In paragraphs 3 and 4 of that resolution, Montana essentially asked Wyoming to agree to novel interpretations of the Compact which would have rewritten it as a non-depletion compact, and a groundwater compact. *Id.* at A-4 through A-5. The resolution never came to a vote for lack of a second. The resolution was symptomatic of Montana's efforts over the last several years to bring its Compact interpretation issues before the commission, while ignoring the commission's true jurisdiction under the Compact to engage in "the collection, correlation, and presentation of factual data. . . ." YRC art. III. § C.

In summary, when droughts in 2004 and 2006 have curtailed irrigation on the Tongue and Powder in both states to early pre-1950 rights, Wyoming has shared its superior information on Wyoming water rights and uses and has even offered to show Montana its actual uses on the ground. Montana's lack of due diligence in working with Wyoming or the Compact Commission Technical Committee to develop facts about Wyoming's practices has resulted in Montana's failure to make critical factual allegations in its proposed Bill of Complaint. Significantly, Montana has failed to allege with any particularity what, if any, post-1950 Wyoming water rights on the rivers have been satisfied at the same time that Montana pre-1950 users were dry during the recent drought years of 2004 and 2006. Instead, when complaining about Wyoming post-1950 water development in its brief, Montana vaguely states that "[a]ll of these developments since the adoption of the Compact have the potential, in some cases the strong potential, to increase the consumption of water in Wyoming." (Mont. Br. 16) Potentials, and even strong potentials, are not the same as actual allegations of causation or damages that demonstrate serious or dignified claims.

C. A Review of Wyoming's Actual Post-1950 Water Rights Developed on the Tongue and Powder Rivers Undercuts Montana's Claims

Montana has adequately summarized the overall geography of the Tongue and Powder Rivers in its brief. (Mont. Br. 3-4) Montana has not, however, adequately recited Wyoming's diversions under its post-1950 water rights on these rivers. These diversions are important, because Montana bases its case on the third tier of the

Compact's allocation scheme and can only show that Wyoming violated that third tier through calculations that employ Wyoming's actual diversions from the main stems of these rivers.

The majority of the Wyoming water rights for diversions from the Tongue are pre-1950 rights which are grandfathered under Section A of Article V and have no bearing on this case. *See* M. Squillace, *A Critical Look at Wyoming Water Law*, 24 Land & Water L. Rev. 307, 319-327, 332 (1989); App. B ¶ 3. Wyoming has only 23 post-1950 water rights on the Tongue for the irrigation of 1,294 acres of land. App. B. ¶ 3.

The channel of the Tongue River is not dammed in Wyoming, but six post-1950 diversions from the river go into off-channel lakes or ponds. *Id.* ¶ 4. Five of these diversions, totaling 3,359 acre feet, are for fishing, wetlands, wildlife and stock uses. The largest of these, at 2,749 acre feet, is a below grade, reclaimed coal pit permitted for fish, wetlands, stock and wildlife use which does not actually receive direct diversions from the Tongue because it is not actively managed. *Id.* Only one of them, a 15 acre foot off-channel slough, stores water for irrigation. *Id.* Because of the nature of these ponds, the net cumulative annual increases or decreases in this storage measured under Article V, Section C. 2 of the Compact would be minimal.* The "point of measurement" on the Tongue River for purposes of Compact allocation calculations under

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* The only significant storage feature on the Tongue is Tongue River Reservoir, which has a capacity of 79,080 acre feet. Since it is located in Montana, it has no bearing on Montana's claims relating to Wyoming's water storage.

Article V, Sections B and C is a stream gauge at Intake, Montana, near Miles City. YRC art. V, § B.3.b.

The Powder River, like the Tongue, has few appurtenant post-1950 water rights governed by the Compact's third tier allocation. Wyoming recognizes 12 post-1950 water rights on the Powder, appurtenant to only 2,306 acres. App. B ¶ 5. There are no Wyoming storage projects that store water diverted from the Powder. *Id.* The "point of measurement" for Section B allocation is the gauge at Locate, Montana, near where the Powder enters the Yellowstone River. YRC art. V, § B.4.b.

The Little Powder River, a tributary to the Powder, is specifically included in the Compact's third tier allocation formula for post-1950 water rights under Article V, Section B. 4, most likely because it flows in both states, starting in Wyoming and crossing into Montana before joining the Powder. Wyoming recognizes 22 post-1950 water rights on the Little Powder to irrigate 1,367 acres. App. B ¶ 6. In Wyoming, the Little Powder is used to fill two very small irrigation storage projects of less than 35 acre feet. Both of these projects have a 1993 priority date. *Id.* Together, the Powder and Little Powder have 34 post-1950 rights to irrigate 3,673 Wyoming acres. *Id.*

Wyoming's limited development of post-1950 diversions and storage from the Tongue, Powder and Little Powder to date, makes it almost impossible for Wyoming to violate the Compact's third tier percentage allocation scheme, as will be explained below.

SUMMARY OF ARGUMENT

Montana claims that Wyoming has depleted the flows in the Tongue and Powder by developing groundwater wells, sprinkler irrigation, storage reservoirs, and new irrigated lands. However, the Compact does not control or even address groundwater. It contains no restrictions on irrigation methods such as sprinkler systems. As to new storage and new irrigated lands, the Compact drafters presumed that both states would develop such new uses on these rivers. That is why in Article V of the Compact the drafters allocated by percentages to each state the right to make post-1950 use of divertible surface water in the rivers. Montana ignores this plain allocation language for post-1950 uses and instead bases its claim on a non-depletion theory that is totally absent from the Compact. Montana also fails to adequately allege that its users suffered damages caused by Wyoming post-1950 uses. Montana's proposed Bill of Complaint lacks sufficient seriousness and dignity to survive this Court's gatekeeping analysis.

This Court can cure Montana's failure to develop a factual case by denying its motion and referring it to the Yellowstone River Compact Commission. The Compact Commission is an alternative forum with adequate powers to require Wyoming and Montana to collect, correlate and present factual data about their water rights and regulatory operations, a process Wyoming has subscribed to for many years. This Court is not the proper forum for an interstate compact dispute until there is more than a theoretical disagreement.

ARGUMENT

A. The Court's Gatekeeping Standards

This Court has held that its original jurisdiction should be exercised sparingly. *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992). The Court has "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court." *Id.*, *quoting Texas v. New Mexico*, 462 U.S. 554, 570 (1983). The Court looks at two separate factors in exercising this discretion: (1) the seriousness and dignity of the complaining state's claim; and (2) the availability of an alternative forum in which the issue tendered can be resolved. *Mississippi*, 506 U.S. at 77.

This Court has not clearly stated the burden of proof that the plaintiff must carry to win its motion to file its bill of complaint. In several cases between states, this Court has required the plaintiff to show serious harm by clear and convincing evidence, but these cases involved proceedings after the Court granted leave to file the bill. Robert L. Stern et al., *Supreme Court Practice* 563 (8th ed. 2002); *e.g.*, *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931). Given the Court's desire to exercise original jurisdiction sparingly out of respect for state sovereignty, a clear and convincing standard makes sense.

The gatekeeping function is intended to prevent states from presenting legal arguments that border on the frivolous under the plain meaning of the relevant compact. A compact is a contract between states, as well as a federal statute. *See Texas v. New Mexico*, 462 U.S. 554, 564 (1983). "[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." *Id.*; *see also Oklahoma v.*

New Mexico, 501 U.S. 221, 245 (1991) (Rehnquist, J., dissenting). The Court is not free to rewrite a compact. *Texas v. New Mexico*, 462 U.S. 554, 565 (1983).

Obviously, at the inception of an action, the universe of evidence is less than what the parties could develop after pleadings are filed and discovery completed. Nevertheless, the Court's gatekeeping function in these cases requires the complaining state to provide some substance. *Florida v. Mellon*, 273 U.S. 12, 17-18 (1927). The plaintiff state must show more than remote, speculative or indirect injury. *Id.* at 18.

B. Montana Fails to State a Claim regarding Wyoming's Groundwater Development

Montana alleges that Wyoming has violated Article V of the Compact by developing groundwater wells for irrigation and production of coalbed natural gas in the Tongue and Powder Basins after 1950. (Proposed Bill of Complaint 3, ¶ 11) However, the drafters of the Compact made it clear through plain language in their definitions of the "Yellowstone River System," "Tributary," and "Interstate Tributaries," that Article V is intended to deal only with surface waters. YRC art. II, §§ D, E, F. In a 1975 law review article, Helena, Montana lawyer Henry Loble made this same point when he wrote: "The Yellowstone River Compact makes no reference to or provision for the allocation and apportionment of interstate underground waters or what is often referred to as ground waters. In this it is no different from most other interstate water compacts." H. Loble, *Interstate Water Compacts and Mineral Development (With Emphasis on the Yellowstone River Compact)*, 21 Rocky Mtn. Min. Law Inst. 777, 784 (1975).

Groundwater simply has no place in a case involving this Compact.

Montana reveals through its discussion of groundwater in its own brief that it is actually asking this Court to rewrite the Compact. After Montana states that "such [groundwater] pumping would constitute a violation of the Compact," it does not cite the Yellowstone River Compact. (Mont. Br. 15) Instead, it cites cases from this Court interpreting the Arkansas and Republican River Compacts. *Id.* Those compacts are explicitly based on the non-depletion principle. Arkansas River Compact, Pub. L. No. 81-82, 63 Stat. 145, art. IV.D (1949); *see also, Kansas v. Colorado*, 514 U.S. 673, 680 (1995); Republican River Compact, Pub. L. No. 78-60, 57 Stat. 86, art. III (1943).

The Yellowstone River Compact is *not* a non-depletion compact. Its allocation of post-1950 water is based on the divertible flow principle, under which surface water that happens to be available for diversion from the rivers is allocated to the states by percentages. Students of the Compact, including three of Montana's own Water Division representatives, have confirmed in writing that the Compact is based on the divertible flow principle, not non-depletion. Appendix A, Letter and white paper from Orrin Ferris, Administrator of the Water Resources Division of the Montana DNRC to Wyoming State Engineer 3 (1976) ("The compact is explicit in allocating waters based on diversions rather than depletions; in fact, return flows are never mentioned."); Dan Ashenberg, *A Cooperative Plan to Administer the Yellowstone River Compact*, (Water Resources Division, Montana DNRC Draft report Nov. 1983) (the Compact "apportions flows based on diversions, not on depletions."); Montana DNRC, *Yellowstone River Compact* 32 (Nov. 29, 1989) ("The apportionment formula in Article

V is based on diversions and not depletions."); *see also* Floyd A. Bishop, *Interstate Water Compacts and Mineral Development (Administrative Aspects)*, 21 Rocky Mtn. Min. Law Inst. 801, 802 (1975).

Maybe Montana wishes it had entered into a non-depletion compact containing the language of the Arkansas or Republican River compacts. However, this Court cannot interpret the Compact by looking to different language from other compacts between other states. *See Texas v. New Mexico*, 462 U.S. 554, 565 (1983).

Besides asking this Court to rewrite the Compact to cover a subject that is totally absent, Montana fails to show that it has adequately investigated the facts surrounding its groundwater depletion claim. Montana claims that "[a]ll groundwater pumping has the *potential* to deplete the compacted waters of the Powder and Tongue Rivers," so "to the extent that such pumping depletes the waters," "such pumping *would constitute* a violation of the Compact." (Mont. Br. 15) (emphasis added). Thus, Montana does not actually claim that Wyoming groundwater development has adversely affected its users one iota. Even if the groundwater claim had any legal merit, this Court could not accept the case before Montana does its homework on causation and damages. *See Florida v. Mellon*, 273 U.S. 12, 17-18 (1927).

C. Montana Fails to State a Claim regarding Wyoming's Increased Irrigation Efficiencies

Montana alleges that Wyoming has violated the Compact by increasing the efficiency of its irrigation practices since 1950. (Proposed Bill of Complaint 4, ¶ 12). Wyoming does not deny that some of its irrigators on the

Tongue and Powder, like some Montana irrigators, have switched from flood to sprinkler irrigation. The question remains, however, how such efficiency improvements would violate the Compact.

As Montana has admitted, Wyoming's pre-1950 appropriative rights to surface waters are confirmed by Section A of Article V. (Mont. Br. 19) Section A specifically states that such water rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." As of 1950, Wyoming's appropriation law governing the acquisition and use of water from a river was quite clear on irrigators' rights to consume the water that they diverted. As long as the irrigators complied with their permits or adjudicated rights by applying the water only to their permitted acreage they could consume *all* of what they diverted. *Binning v. Miller*, 102 P.2d 54, 60-61 (Wyo. 1940); *Bower v. Big Horn Canal Association*, 307 P.2d 593, 601 (Wyo. 1957). Since this law was incorporated by the drafters of the Compact, Wyoming irrigators with pre-1950 water rights comply with the Compact regardless of whether they partially or completely eliminate return flows to the river through new irrigation methods.

In *Bower*, the Wyoming Supreme Court wrote:

> No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator by a different method of irrigation can so utilize his water that it is all consumed in transpiration and consumptive use and no waste water returns by seepage or percolation to the river, no other appropriator can complain.

307 P.2d 593 at 601.

Analysis of sprinkler irrigation by irrigators with post-1950 rights under Section B of Article V is no different than the Section A analysis for pre-1950 rights. When divertible surface water is available, Section B allows irrigators in Wyoming and Montana to divert water from the main stems of the Tongue and Powder for supplemental supplies to lands already under pre-1950 rights, and also for "direct diversions" onto new lands. In Section B, the drafters did not state what methods these irrigators must use to apply these diversions to their lands. They imposed no efficiency limit on irrigation, and no minimum flow that irrigators must return to the river from their land after using the water. As Montana's own Water Resources Division Administrator, Orrin Ferris, wrote about the Compact in 1976, "return flows are never mentioned." App. A at 3.

The restriction on the diversion of water to post-1950 rights that is set forth in the third tier of Article V of the Compact is not based on Wyoming's *consumption* of the water that its users divert. Instead, it is based on a running percentage of total divertible flows that Wyoming users have *diverted* from a river channel as of any particular date in the water year. YRC art. V, § C. 1-4. For example, if a Wyoming irrigator's diversion for his post-1950 right on the Tongue River does not push the cumulative annual percentage of Wyoming diversions above 40%, then Wyoming has complied with the Compact on that date. The amount of return flow to the river on that day is irrelevant, as long as the diversion at the headgate did not push Wyoming over the Compact's limit for total Wyoming diversions.

In summary, the plain language of the Compact defeats Montana's contention that Wyoming's irrigation

methods and efficiencies are somehow governed by the Compact. Montana and Wyoming irrigators are to be commended for the efficiency gains they have achieved with sprinklers, and this Court should not waste its time rewriting the Compact to provide return flows or consumption limits which the Compact drafters did not intend.

D. Montana Fails to State a Claim regarding Wyoming's Storage Development

In addition to challenging Wyoming's post-1950 development of groundwater and sprinkler irrigation, Montana questions Wyoming's construction and use of new water storage in the Tongue and Powder River Basins since 1950. (Proposed Bill of Complaint 3, ¶ 9) Montana does not deny that water storage is often a good thing in arid western states. It admits that "the only feasible means of supplying the year-round needs of the population from surface water is through water storage projects. . . ." (Mont. Br. 10-11); *see also Fed. Land Bank v. Morris*, 116 P.2d 1007, 1011 (Mont. 1941) (lauding water storage development). Montana cannot state a claim by simply making a parochial allegation that storage is a good thing in Montana but a bad thing in Wyoming. To state a claim it must allege how Wyoming's development of storage has actually violated the Compact.

Montana's storage claim lacks any legal support in the Compact. In their percentage allocation of remaining water under the third tier of Article V, the drafters of the Compact specifically provided for the future use of such water for "*storage* or direct diversions for beneficial use on new lands or for other purposes." YRC art. V, § B

(emphasis added). They then specified how the remaining water, including stored water, must be allocated between the states by percentages. The drafters thus contemplated that the states would construct post-1950 storage on the "Interstate Tributaries," and provided that such storage be allocated under the divertible flow principle.

Moreover, the Section C formula for measuring whether each state is staying within its percentage of cumulative divertible flow includes subsections for net changes in post-1950 stored water. YRC art. V, §§ C. 2 and C. 3. The drafters would not have included this post-1950 storage within the apportionment formula if they thought the states could not add storage on the Interstate Tributaries after 1950.

In addition, Montana cannot complain about the specific Wyoming reservoirs it discusses in its brief. (Mont. Br. 14) All of these reservoirs are located on tributaries to the Tongue and Powder, and not on the main stems of those rivers. The third tier allocation of Article V only allocates to each state the post-1950 storage rights (and direct diversion rights) for waters of the "Interstate Tributaries," and of the Little Powder River by specific inclusion.* The "Interstate Tributaries" are defined to include the main stems of the Powder and Tongue, not their tributaries. YRC art. II, § F. Thus, the Compact does not purport to govern water stored in reservoirs on the tributaries to the Tongue, Powder and Little Powder, the

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* In contrast to the third tier's allocation of water only from the main stems of the "Interstate Tributaries," the pre-1950 water rights grandfathered under Section A of Article V, apply to the "Yellowstone River System," which by definition includes not only the "Interstate Tributaries," but also the tributaries to the "Interstate Tributaries."

only reservoirs about which Montana complains. (See Mont. Br. 14 and App. A thereto at A-2 (map)).

A few small reservoirs have been constructed in Wyoming since 1950 along the main stems of the Tongue, Powder and Little Powder, so diversions from these rivers to them are governed by the third tier allocation. However, Montana does not complain about these reservoirs in its brief, as well it should not, since they are unlikely to cause any water shortages downstream.

Montana does not state specifically how any Wyoming reservoirs built after 1950 have caused damage to its users. The closest Montana gets to a damage allegation regarding Wyoming storage is its statement in its brief that "[a]ll of these developments since the adoption of the Compact have the *potential*, in some cases the *strong potential*, to increase the consumption of water in Wyoming." (Mont. Br. 16 (emphasis added)) After this weak attempt at a damage allegation, Montana then has the audacity to complain about a reservoir on the Middle Fork of the Powder in Wyoming that has never been built. (Mont. Br. 17) The Wyoming State Engineer received an application for a permit for this reservoir before the Compact was finalized, more than half a century ago, and nothing has come of it. This Court surely has enough to do without predicting how the construction and operation of a dam, which has not been built in over 50 years since it was permitted, could some day impact Montana users under the Compact.

In summary, Montana complains about post-1950 Wyoming storage reservoirs even though the Compact allows the storage of water in such reservoirs. Also, the particular reservoirs that Montana identifies are on

tributaries to the Tongue and Powder Rivers that are not covered by the third tier allocation of Article V. Finally, Montana's allegations that Wyoming's operation of such reservoirs has the "potential" to harm Montana do not yield a ripe claim for relief. Montana has not shown in its filings that reservoir storage is a serious and dignified issue justifying this Court's time.

E. Montana Fails to State a Claim regarding Wyoming's Added Irrigated Acreage

In its fourth significant allegation, Montana claims that Wyoming has violated the Compact by allowing new land to be put into irrigation from the Tongue and Powder Rivers after January 1, 1950. (Proposed Bill of Complaint 3, ¶ 10) Although the amount of land that may be legally irrigated from the Tongue, Powder and Little Powder in Wyoming under post-1950 rights is quite small, Wyoming concedes that it has recognized such new rights. Montana has also opened new lands to irrigation from the Tongue and the Powder after January 1, 1950, and Wyoming does not criticize Montana for doing so. The Compact, after all, states in its preamble that one of its purposes is "to encourage the beneficial development and use" of the Yellowstone River and its tributaries.

To determine how Montana thinks Wyoming has violated the Compact by recognizing post-1950 water rights to new lands, one must look beyond Montana's vague proposed Bill of Complaint and scrutinize its brief. On page 14 of that brief, Montana concedes: "Putting new lands under irrigation after January 1, 1950 is not, in and of itself, a violation of the Compact." But Montana then states: "Rather, in Montana's view, it is the failure of

Wyoming to curtail uses of water on such new lands, when necessary to protect Montana's rights under the Compact, that constitutes the Compact violation." (Mont. Br. 14) Montana fails to further explain what Montana rights have been damaged, what Wyoming diversions based on post-1950 rights caused such damage, and when such damage occurred. Montana's brief is devoid of facts or arguments on this critical issue.

Given Montana's failure during recent drought years to accept Wyoming's invitation to inspect actual diversions on the Tongue and Powder, it is not surprising that Montana has not specifically alleged that its irrigators have suffered from low flows as a result of post-1950 Wyoming uses. Montana has some duty to indicate that it has suffered damage before it asks this Court and Wyoming to commit significant resources to this case. *See Alabama v. Arizona*, 291 U.S. 286, 291-292 (1934) (damages are a necessary element of original jurisdiction). This Court's gatekeeping function would be well-served if the Court would deny Montana's motion until such time as it comes forward with specific justiciable claims of Compact violation, causation and injury.

Because Section A of Article V confirms only pre-1950 water rights in each state, it has no bearing on Wyoming's development of post-1950 rights. That is left to Section B, which again, only deals with surface water rights on the main stems of the Tongue, Powder (and Little Powder), Big Horn, and Clark's Fork of the Yellowstone (the "Interstate Tributaries"). Although Montana's proposed Bill of Complaint does not allege a particular year in which it thinks Wyoming allowed too many post-1950 diversions, the logical candidates are the drought years of 2004 and 2006, because they are the years in which Montana sent

letters of complaint to Wyoming. App. B ¶¶ 7, 12. To determine if Wyoming's post-1950 diversions exceeded Wyoming's percentage allocation on the Tongue of 40%, or its percentage allocation on the combined Powder and Little Powder of 42%, on any particular day in a water year, one must know the cumulative post-1950 diversions in Wyoming as of that date, and divide it by the cumulative quantity of divertible flow under subsections 1-4 of Section C. YRC art. V, § C.

Two kinds of post-1950 Wyoming diversions from these rivers must be combined to calculate the total Wyoming diversions subject to the allocation percentages: (1) direct diversions in Wyoming for irrigation or other uses, and (2) diversions into storage in Wyoming. The total divertible flow to which the Wyoming diversions are compared consists of cumulative diversions in both states from October 1 to the date at issue, cumulative diversions into post-1950 storage in both states, and the cumulative amount of water that flowed past the point of measurement at the bottom of the particular river. YRC art. V, § C.

Montana's Administrator of Water Resources, Jack Stults, wrote letters to Wyoming's State Engineer on May 18, 2004 and July 28, 2006 complaining about the low level of the Tongue and Powder Rivers. Calculating the compact percentages on the Tongue and Powder/Little Powder using these dates, shows how frivolous Montana's claim about Wyoming's post-1950 use really is. Even when giving Montana the benefit of all doubt on its own and Wyoming's diversions from these rivers in 2004 and 2006, Wyoming's use of the cumulative divertible flows must have been well below the Compact percentages of 40% and 42%. *See* App. B ¶ 18 (Affidavit of Wyoming State Engineer Patrick Tyrrell with calculations based on actual

flows past the points of measurement, actual Wyoming water rights, and with other assumptions disfavoring Wyoming). As of May 18, 2004, Wyoming's post-1950 total diversions from the Tongue would have been no more than 9.8% of the 40% to which it was entitled, and its total diversions from the Powder/Little Powder no more than 6.8%, of the 42% to which it was entitled. App. B ¶¶ 18a. and 18c. As of July 28, 2006 Wyoming's total diversions would have been no more than 6.1% (Tongue) and 4.6% (Powder/Little Powder). App. B ¶¶ 18b. and 18d.

The reasons why Montana has not alleged that Wyoming has diverted water in excess of its percentage allocations for post-1950 rights are simple. Wyoming has not added enough direct flow or storage rights on the Tongue, Powder or Little Powder Rivers since 1950 to do so, and Montana regularly allows large quantities of water to flow unused and unstored down the Powder and the Tongue past the points of measurement. *See* App. B ¶ 18. Wyoming's post-1950 direct diversion original rights to new land on the main stems of these rivers allows for the irrigation of only 3,382 acres. App. B ¶¶ 3, 5, 6. Wyoming's post-1950 storage that may be filled by diversions from these rivers totals only 3,439 acre feet, and most of that storage is in trout ponds that are never drained and refilled. *Id.* ¶¶ 4, 6. Even if Wyoming had used all of its post-1950 original and storage water rights in 2004 and 2006, such use would be a drop in the bucket.

One of the pro-Montana assumptions embedded in these calculations was that Wyoming irrigators and reservoir owners with post-1950 rights on the main stems of the Tongue, Powder, and Little Powder would divert their full appropriations from April 1 through the dates of the Montana letters. However, the probability is very small that more than a few incidental irrigators using

these post-1950 rights would still have been diverting after drought conditions in 2004 and 2006 had caused Montana to write its letters. In 2004, for example, the Tongue River flowed at 20% of average over the season, and the Powder carried a record low flow at 14% of average over the season. Yellowstone River Compact Commission, Fifty-third Annual Report V (2004); App. B ¶ 16.

Those rivers are the source of supply for numerous Wyoming pre-1950 rights, many of which would not be satisfied under drought conditions. Any post-1950 rights would be junior to these pre-1950 rights and those junior rights are the first to be denied water when intrastate regulation occurs under Wyoming prior appropriation law. App. B ¶ 16; WYO. CONST. art. 8, § 3. In a November, 1983 draft report, entitled *A Cooperative Plan to Administer the Yellowstone River Compact*, Dan Ashenberg of Montana's DNRC, Water Resources Division, explained this reality quite well:

> The Yellowstone River Compact recognizes all water rights existing as of January 1, 1950. The result is that the Compact does not address the division of water during extremely low flow periods because the majority of appropriations in the Yellowstone Basin have a priority date earlier than 1950. If there is insufficient water to satisfy all pre-1950 uses in both states, Wyoming water users would first satisfy their pre-1950 demands. Montana users could then appropriate the remainder, including the accumulated return flow generated in Wyoming. Because agricultural and industrial development since 1950 has been minimal, the need to regulate post-1950 appropriations in Wyoming for the purpose of satisfying pre-1950 appropriations in Montana would also be minimal.

In summary, when the correct divertible flow principle, embodied in Sections B and C of Article V, is applied to the actual facts that Montana has yet to explore, Montana is unable to state a valid claim for relief. This is equally true for Wyoming's post-1950 development of new irrigated land, and Wyoming's post 1950 development of groundwater, sprinkler systems, and reservoirs. Montana has not made a sufficient showing of an actual Compact violation that presents a ripe controversy to this Court. *See Texas v. United States*, 523 U.S. 296, 300-302 (1998). Its claims are not of sufficient seriousness or dignity to justify further proceedings in this Court.

F. Montana has an Adequate Alternative Forum

Besides analyzing the seriousness of a state's claim, this Court may also consider whether the state will have an adequate alternative forum if the Court denies the state's motion to file. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Wyoming agrees with Montana that the Yellowstone River Compact Commission is not a forum charged with interpreting the Compact. If Wyoming had violated the Compact and Montana had credible facts and valid legal arguments establishing such violations, then a dispute over Montana's Compact interpretations should go to this Court, and not the Compact Commission. However, Montana blatantly contradicts the plain terms of the Compact when it complains of river "depletion," and fails to allege divertible flow violations under Article V. It also shirks its duty to this Court and to Wyoming, when it fails to allege that Wyoming users have actually violated the Compact and that such violations actually caused harm to Montana users. Potential for harm, or even the strong

potential for harm, is not enough to make a justiciable case or controversy. (*See* Mont. Br. 16.)

Given Montana's inability to state a case under the Compact, the Compact Commission is exactly the right forum for Montana. The commission has the authority under Article III, Section C of the Compact to assist Montana in investigating the facts of how Wyoming has used the Tongue, Powder and Little Powder Rivers through both abundance and drought. "[T]he jurisdiction of the Commission shall include the collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this Compact . . ." YRC art. III, § C. History shows that Wyoming will fully cooperate with the commission, the commission's technical committee, and Montana, to get the facts. Wyoming has backed its cooperative spirit with appropriated funds. But even if Wyoming were to fail to cooperate, the commission has the power to get the facts.

Lacking any facts to support substantial allegations that Wyoming has violated the Compact, and that such violations have caused damages to Montana users, Montana is merely seeking an advisory opinion on Compact interpretation from this Court. Montana's remote and speculative factual allegations are accompanied by invalid legal claims for relief under the plain terms of the Compact. Montana has failed to show that it has a serious and dignified claim as required to satisfy this Court's gatekeeping analysis, so this Court should deny its motion to file. Moreover, because the Compact Commission is an adequate alternative forum for Montana, this Court should deny Montana's motion based on this second factor of the Court's gatekeeping analysis.

CONCLUSION

Wyoming requests that the Court deny Montana's Motion for Leave to File Bill of Complaint.

Respectfully submitted,

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April 2007

APPENDIX A

[LOGO]

WATER RESOURCES
DIVISION

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ADMINISTRATOR

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION
THOMAS L. JUDGE, GOVERNOR
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March 2, 1976

Mr. George Christopulos
State Engineer
State Office Building East
Cheyenne, WY 82002

Dear Mr. Christopulos:

Last December we agreed to exchange letters prior to our March meeting so that each state could gain a better understanding of compact issues. Attached is a paper which is our attempt to describe the differences or similarities in each state's water law as seen from a planning perspective. The paper has not been reviewed by counsel so may be weak in that area. At any rate, I hope this is helpful.

Will see you next week.

Sincerely,

/s/ Orrin Ferris
Orrin Ferris, Administrator
Water Resources Division

OF/jc

cc: Frank Trelease
Jack Acord
Rick Bondy
Ted Doney
Walter Scott
George Pike
Laurence Siroky

PRIORITY DATES

In Wyoming an appropriation right is initiated by making application to the State Engineer for a permit to make the appropriation; and the final step after the appropriation has been perfected in accordance with the permit is the adjudication of the right by the Board of Control and the issuance by the Board of a certificate of appropriation. The priority of each appropriation dates from the filing of the application in the office of the State Engineer. This procedure has been in effect since 1890. Failure to make use of appropriated water for five successive years is considered abandonment and forfeits that water right; however, an extension may be granted by the State Engineer.

Adjudication of water rights are initiated and made by the Board of Control. The State Engineer, in the original adjudication of a stream makes a hydraulic survey, and

the water division superintendent takes testimony concerning claims of water rights. This information is transmitted to the Board of Control, which enters an order determining and establishing the priorities.

No allotment for the direct use of the natural unstored flow of any stream shall exceed one cubic foot per second for each seventy acres of land. However, if there is water in any stream, in excess of all appropriations, this excess will be divided among the appropriators in proportion to the acreage covered by their permits, up to a maximum of 1 cfs per 70 acres.

In Montana, prior to the 1973 Water Use Act, a water right was obtained by either filing with the County (called "filings") or by merely using the water (called "use" rights). For "use" rights the date of priority is the date the water was actually put to use, while for "filings" the priority date is the date the appropriator posted a notice at the intended point of diversion. Rights could be abandoned by filing or through court action.

Under the 1973 Water Use Act the appropriator must file with the Department of Natural Resources and Conservation. If the application is complete and all requirements met, the applicant will be issued a provisional water right that may be modified during court adjudication. The priority date of the water right is the date the Department receives the application. After adjudication the right may be abandoned by 10 consecutive years of nonuse and by petition to the court. There is no set limit in the law on the amount of water that may be appropriated for each acre irrigated. Water may be appropriated only to the limit of beneficial use.

A basic issue in compact negotiations is the determination of pre and post 1950 rights. While Wyoming may have a better handle on rights because of their long standing centralized water law, it is apparent that the filings received by the State Engineer do not necessarily correlate with the amount of water actually put to use. In fact, it is estimated that only 50% of adjudicated rights are used. Montana will have difficulty in documenting water rights pre and post 1950. These rights can be estimated following the logic that Bechtel Corporation used in their "Tongue River Project, Water Allocation Study". Bechtel estimated irrigated acres, and assuming a unit water requirement, derived total water use.

SUPPLEMENTAL WATER

In Wyoming, a supplemental water right is for direct flow diversion of water from a new source of supply for application to lands for which an appropriation of water from a primary source already exists. The total amount of water diverted at any one time, both under a primary appropriation of water and a supplemental supply shall not exceed 1 cfs per 70 acres. Supplemental water, by Wyoming definition, is not water firmed up by storage from the original source. The supplemental supply right priority date has no relation to the original water right. Wyoming water law provision for supplemental water supply do not apply to water stored under a reservoir permit.

There are no provisions for supplemental water in Montana Water Law, each new use is a new right with a separate priority date.

Since in both states each new use is a new right with a separate priority date no significant problem exists except in interpreting the intent of the "supplemental water" portion of the compact. The supplemental water supplies mentioned in the compact does not relate to the definition in Wyoming's water law. The framers of the compact wanted to ensure that sufficient water was allocated to each state so that pre 1950 lands could receive a full water supply from any source, be it a new source or from storage on the original source.

According to the Compact, these supplemental rights are "to be acquired . . . in accordance with the laws governing the . . . use of water under the doctrine of appropriation." Supplemental water supply for pre 1950 irrigated lands is allocated to each state and the remainder of unused and unappropriated water is then shared on the compact percentage basis. Mutually satisfactory studies have not been made that define valid supplemental water requirements for both states. This item is a major compact consideration and should receive early and close examination.

METHOD OF DETERMINING DIVERSIONS

Diversion is defined in the Compact as the "taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or the tributary from which it is taken." The compact is explicit in allocating waters based on diversions rather than depletions, in fact, return flows are never mentioned. It is apparent, however, that compact allocations based entirely on diversions would favor diversions

for uses that consumed the greater portion of total diversions, for example, industrial use. The original compact negotiators could not see the potential dangers of a diversion based compact since they had no forewarning of energy development and other uses that would totally consume diverted water.

In both states, any change of water right from irrigation use to industrial use would carry with it only the amount that was consumed in the original right. This, however, does not solve the problem of new appropriations. To ensure equitable allocations, it is necessary to somehow account for the depletions involved with individual or cumulative diversions.

SENIOR DOWNSTREAM RIGHTS

Bureau of Reclamation operation studies showed releases from Yellowtail one year (1961) to satisfy downstream rights. Our basic questions were – where are these rights, what are the priority dates, and which tributaries must contribute to these rights? We should identify these "senior rights", but as indicated in our December meeting, these rights would be taken care of automatically in modeling the entire Yellowstone system.

STOCK WATER

Existing and future domestic and stock water uses are excluded from compact provisions as long as stock water ponds are less than 20 acre-feet in size. Wyoming encourages stock water applicants to keep stock water reservoirs below the 20 acre feet capacity by not requiring detailed plans and map work for such structures. Montana now

requires a permit application for stock water use, regardless of size.

RESERVOIR WATER RIGHTS

The question of water use from reservoirs brings up the issue of preferential use in Wyoming. Preferred uses include rights for domestic and transportation purposes, as follows, first, drinking; second, municipal; third, steam engines and general railway use; and fourth, culinary, laundry, bathing, refrigeration; and heating plants. The use of water for irrigation is preferred to any use of water through turbine or impulse water wheels for power purposes. Existing rights that are not preferred may be condemned to supply water for preferred uses. It is possible to change a use to a preferred use under the direction of the Board of Control with compensation to be paid if the change is approved.

In Wyoming, persons planning to store water must make application to the State Engineer for a permit to construct a reservoir. Detailed maps and plans can be required except for stock water exceptions mentioned above. Apparently, the priority date of stored water dates from the application date, even though water may not be put to beneficial use until years later (as happened with Boysen).

In Montana, persons intending to appropriate water by means of a reservoir apply for a permit in the same fashion as a direct flow appropriator. The priority of the right is the application receipt date by the DNR&C.

In both states, if an appropriator does not commence work on the project as specified in the permit, or receive an extension, the state can revoke the permit.

Boysen and Tongue River reservoirs are significant pre 1950 priority date reservoirs. J.S. James, Montana State Engineer, on April 19, 1937, filed on all of the unappropriated waters of the Tongue River for purposes of the Tongue River Reservoir. The priority date of Boysen Reservoir is October 22, 1945.

RESERVOIR EVAPORATION

Reservoir evaporation could be accounted for by change in storage levels. In filling the reservoir the water required to make up evaporation losses is allocated to that state through storage change considerations; the same is true during releases. As long as storage levels are monitored and changes correctly assigned to the state where the reservoir is located, evaporation is accounted for. In fact, if evaporation is measured along with inflow and outflow measurements, the evaporation is double counted.

INSTREAM FLOWS

Wyoming has no provision for instream flows in their water law, although through reservoir operation it may be possible to provide water for instream use. Of course fish and wildlife values are now a beneficial use in Montana. It is DNR&C opinion that no claims for a pre-1950 fish and wildlife rights are valid.

SURPLUS WATER - WYOMING

Surplus water is the quantity of water belonging to the State of Wyoming flowing in the natural channel of any main stream or tributary, at any time in excess of the total amount required to furnish to all appropriators the maximum water in the appropriation. A right to the use of surplus water is a maximum of one cubic foot of water per seventy acres having a water right. Surplus rights bear the date of priority as of March 1, 1945 when attached to an adjudicated right. Unadjudicated rights acquire the surplus right as the original is perfected. When anyone has applied surplus water to beneficial use, he is entitled to divert and use his proportionate share of surplus water and is entitled to a priority senior to any water right acquired after March 1, 1945.

APPENDIX B

No. 137, Original

In The

Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING,

and

STATE OF NORTH DAKOTA,

Defendants.

AFFIDAVIT OF PATRICK T. TYRRELL

Patrick T. Tyrrell, being sworn, states:

1. I am the current Wyoming State Engineer. I have held that position since January 16, 2001, when I was appointed by the Governor of Wyoming. I make this affidavit in support of the State of Wyoming's Brief in Opposition to the State of Montana's Motion for Leave to File a Bill of Complaint in this case

2. Under Article 8, § 5 of the Wyoming Constitution, I am given "general supervision of the waters of the state and of the officers connected with its distribution." Based on this constitutional authority as well as Wyoming statutory authority, I supervise an agency with a staff of approximately 140 persons from my office in Cheyenne, Wyoming. This staff includes four water division superintendents, one for each of the four water divisions into which Wyoming is divided, and their staffs. The Tongue

and Powder River drainages are located within Water Division II. I have access to all documentation and information that is maintained regarding Water Division II, including information kept at that division's field office in Sheridan, Wyoming and information kept in my offices in Cheyenne.

3. The majority of Wyoming original and supplemental water rights for diversions from the main stem of the Tongue River are for irrigation use and have priority dates preceding January 1, 1950. Wyoming has 23 post-1950 water rights on the main stem of the Tongue River for the irrigation of 1,294 acres. Of these acres, 753 are irrigated with original post-1950 rights.

4. Six post-1950 diversions from the main stem of the Tongue River in Wyoming are permitted to go into lakes or ponds. Five of these diversions, totaling 3,360 acre feet, are for fishing, wetlands, wildlife and stock uses. One of them, a 15 acre foot off-channel slough, stores water for irrigation. The largest of them, at 2,749 acre feet, is a reclaimed, below grade coal pit that is filled with water and permitted for fish, wetland, stock and wildlife uses, but is not actively managed, its level being closely related to river stage. Since most of the Tongue River storage is to maintain fish and wildlife and not for irrigation, these lakes and ponds are not generally drained in large amounts annually and they require only minor refilling from time to time to compensate for leakage, evaporation and stock ingestion.

5. There are 12 original and supplemental water rights on the main stem of the Powder River with post-1950 priority dates, for irrigation of 2,306 acres. Of these acres, 1,417 are irrigated with original post-1950 rights.

There are no Wyoming storage projects that store water diverted from the Powder.

6. In Wyoming, the Little Powder River contains two irrigation storage projects of less than 35 acre feet (64 af total), each with a 1993 priority date. Wyoming recognizes 22 post-1950 original and supplemental water rights on the Little Powder to irrigate 1,367 acres. Of these acres, 1,212 are irrigated with original post-1950 rights. Together, the Powder and Little Powder Rivers have 34 post-1950 rights to irrigate 3,673 acres. The information on Wyoming rights in paragraphs 3-6 above has been publicly available for years, and available on the Wyoming State Engineer's website since October of 2003.

7. On May 18, 2004, Jack Stults, Division Administrator, Water Resources Division, Montana Department of Natural Resources and Conservation, wrote me a letter regarding "Call for Water under Yellowstone River Compact." In that year, a drought afflicted both the Tongue and Powder River drainages in Wyoming and Montana. In his letter, Mr. Stults stated that insufficient water was flowing into Montana in the Tongue, Powder, and Little Powder Rivers to satisfy all pre-1950 Montana water rights. He did not make a non-depletion argument that Wyoming was obligated to ensure that the rivers stayed above some certain flow rates at the state line. Instead, he took the position that Wyoming should reduce its diversions of junior Wyoming pre-1950 water to satisfy rights of Montana users with pre-1950 water rights that were senior to the Wyoming rights. He wrote: "We are calling for all pre-1950 junior water in Wyoming to satisfy our senior pre-1950 water on the Tongue and Powder Rivers." Mr. Stults also demanded in his letter that Wyoming require its

owners of stored water in the Tongue and Powder drainages to immediately release all water that had been previously stored under post-1950 rights. I responded to the letter with a letter to Mr. Stults dated May 24, 2004.

8. In my letter of May 24, 2004 to Mr. Stults, I suggested a meeting in early June to discuss the issues raised by his letter. Mr. Stults, attorneys for each state, and members of our staffs, did have a face to face meeting on June 10, 2004 in Sheridan, Wyoming and had a wide ranging discussion of compact issues. We met again on June 30, 2004 by conference call, and that call led the parties to submit information requests to each other. In the June 30, 2004 conference call, Mr. Stults and I also agreed to assign information gathering and sharing to our technical staffs, to include tours of both the Montana and Wyoming parts of the Tongue and Powder Rivers to review irrigation practices and water use. In June of 2004, we provided Montana with a copy of our Tabulation of Adjudicated Water Rights of the State of Wyoming – Water Division Number 2, Surface Water, covering both the Powder and Tongue Rivers. After reviewing each others' written information requests, Mr. Stults and I spoke again on July 28, 2004 and we agreed to have our subordinates, Sue Lowry (Wyoming) and Rich Moy (Montana), review the requests and prioritize the joint data gathering and analysis. Sue Lowry sent an electronic mail message to Rich Moy on August 4, 2004 in which she offered dates later in August to go over data requests and to tour Wyoming diversions. Montana did not agree to a date in August for this activity. However, Ms. Lowry saw Mr. Moy at a Missouri River Basin Association meeting on September 8, 2004, and they agreed to have a technical committee meeting in Sheridan, Wyoming on October 20, 2004. On

October 15, 2004, Mr. Moy sent an electronic mail message to Ms. Lowry stating that Montana would have to cancel the meeting because Montana representatives had not prepared for it.

9. An annual Yellowstone River Compact Commission meeting was held in Billings, Montana on December 6, 2004, and I attended as Wyoming's commissioner. Montana and Wyoming agreed that Ms. Lowry and Mr. Moy would meet to develop technical procedures and bring them to the next compact commission meeting in April, 2005. Ms. Lowry and Mr. Moy did not accomplish their assigned tasks, however, because on January 19, 2005, at a Missouri River Basin Association Meeting, Mr. Moy spoke with Ms. Lowry and declined to propose a meeting date because the Montana Attorney General's Office had advised that Montana should go to court to get a declaratory judgment on the Yellowstone River Compact.

10. A meeting of the Technical Committee of the Yellowstone River Compact Commission was held in Sheridan, Wyoming on April 25, 2005, the day before a meeting of the full commission. At the Technical Committee meeting, Wyoming presented information on storage facilities in the Tongue and Powder River drainages. The Technical Committee also selected November 29, 2005 as the date of the next Technical Committee meeting, but on October 24, 2005, Montana canceled the November meeting. At the Yellowstone River Compact Commission meeting that was held in Billings on November 30, 2005, Ms. Lowry stated that the Technical Committee needed direction concerning its task of forecasting and estimating during drought years the number of water rights that could be filled, since that task required discussions between the states and a commitment of time from each

state to better understand each state's administrative system. Montana's Commissioner Stults replied that the task would be a great thing to do, but was not feasible because of resource constraints. In spite of Montana's failure to go ahead with most of the technical investigation, the Division II superintendent did provide Montana with copies of his hydrographer's reports for the Tongue and Powder River drainages for the 2004 and 2005 water years. The 2006 report has not yet been provided to Montana because it is still being prepared. The hydrographer's reports contain data on diversions that actually occurred in the Tongue and Powder River drainages.

11. In July of 2005, I requested in the Wyoming State Engineer's fiscal year 2007-2008 budget request that the Wyoming State Legislature appropriate $100,000 to contribute to a joint study with Montana of technical issues involving waters of the Yellowstone River Compact rivers. Despite Montana's failure to participate in technical meetings and tours, I proceeded to seek this appropriation in 2005 and during the 2006 session of the Wyoming Legislature. The legislature approved the request, and the $100,000 was appropriated in 2006.

12. Water was plentiful in the Tongue and Powder drainages in the 2005 water year. However, drought conditions returned in 2006. On July 28, 2006, Mr. Stults wrote me a letter requesting that Wyoming administer the waters of the Tongue and Powder Rivers by curtailing post-1950 diversions or storage. I responded with a letter dated August 9, 2006 to Rich Moy, who had become acting Division Administrator of Montana's Water Resources Division upon Mr. Stults's departure.

13. In late November of 2006, I received from the federal representative to the Yellowstone River Compact Commission a draft resolution that I understood Montana would propose at the December 6, 2006 meeting of the Yellowstone River Compact Commission. Montana contended that Wyoming had an obligation not to deplete surface water in the Tongue and Powder through groundwater withdrawals. Montana did offer the resolution at the commission meeting on December 6, 2006, but it did not come to a vote of the commission because it was not seconded.

14. To the best of my ability, I have calculated Wyoming's diversions from the Tongue, Powder and Little Powder Rivers as a percentage of the total divertible flow under Article V, Section C, of the Yellowstone River Compact as of the dates of the letters from Jack Stults to me on May 18, 2004 and July 28, 2006. Using figures that are available, including Yellowstone River Compact Commission figures and United States Geological Survey streamflow data for flows past the points of measurement, and by making several pro-Montana assumptions that would reflect maximum legal Wyoming use and minimum overall use in the rivers, I have been able to calculate the maximum percentages of Wyoming's use on those dates.

15. My first assumption for purposes of the calculations involves the Wyoming storage reservoirs that may be filled from diversions from the Tongue and Little Powder. I did not consider the Powder because it has no storage on its main stem in Wyoming. Although most of the storage on the Tongue and Powder is for fisheries and wildlife, and would not be drained from year to year, I assumed for purposes of my calculations that all of these reservoirs were drained and filled completely in the 2004 and 2006

water years before the dates of Mr. Stults's letters, which would result in a net gain in storage of their full capacities. Those total capacities were 3,375 acre feet of storage from the Tongue, and 64 acre feet from the Little Powder.

16. My second assumption for purposes of the calculations was that all of the Wyoming users with post-1950 direct diversion rights on the main stems of the Tongue, Powder and Little Powder, diverted the full amounts under those rights from April 1 to the dates of Mr. Stults's letters. This assumption is most likely a great overstatement of such Wyoming diversions. First, most irrigation diversions from these rivers would not begin until after April 1. Second, the probability is very small that more than one or two incidental irrigators using these post-1950 rights would still have been diverting after drought conditions in 2004 and 2006 had reduced Wyoming pre-1950 uses by the dates in question, May 18, 2004 and July 28, 2006. In 2004, the Tongue River flowed at 20% of average over the season, and the Powder carried a record low flow at 14% of average over the season. The Tongue, Powder and Little Powder are the source of supply for numerous Wyoming pre-1950 rights, many of which would not be satisfied under drought conditions, and the post-1950 rights thereon are also highly unlikely to get water during such low flows. Any post-1950 rights are the first to be denied water if intrastate regulation occurs under Wyoming prior appropriation law.

17. My third and fourth assumptions are that Montana diverted no water from the Tongue, Powder or Little Powder Rivers for post-1950 rights in either the 2004 or 2006 water years, and Montana had no net increase in storage in either of those years under Sections C.2. and C.3. of Article V of the Compact.

18. My calculations of the maximum possible Wyoming percentages of use on the Tongue and Powder/Little Powder in the 2004 and 2006 water years as of May 18, 2004 and July 28, 2006 are as follows (these calculations are based on a conversion from cubic feet per second ("cfs") to acre feet ("af") in which 1 cfs of flow per day = 1.98 af/day):

a. Tongue River as of May 18, 2004

Wyoming maximum diversions: 14.3 cfs/day of post-1950 rights = 28.32 af/day X 48 days (April 1-May 18) = 1,359 af of direct flow + 3,375 af storage capacity = 4,734 af

Total divertible flow: 43,719 af actual total flows measured at point of measurement at Intake, Montana from Oct. 1, 2003 through May 18, 2004 + 4,734 af Wyoming maximum diversions = 48,453 af.

4,734 af maximum Wyoming diversions divided by 48,453 af total divertible flow = 9.8%.

b. Tongue River as of July 28, 2006

Wyoming maximum diversions: 28.32 af/day of post-1950 rights X 119 days (April 1-July 28) = 3,370 af of direct flow + 3,375 af storage capacity = 6,745 af.

Total divertible flow: 103,813 af total flows past point of measurement at Intake, Montana from Oct. 1, 2005 through July 28, 2006 + 6,745 af Wyoming maximum diversions = 110,558 af.

6745 af maximum Wyoming diversions divided by 110,558 af total divertible flow = 6.1%.

c. Powder and Little Powder as of May 18, 2004

Wyoming maximum diversions: 37.63 cfs/day of post-1950 rights = 74.51 af/day X 48 days (April 1-May 18) = 3,576 af of direct flow + 64 af storage capacity = 3,640 af.

Total divertible flow: 50,120 af actual total flows measured at point of measurement at Locate, Montana from Oct. 1, 2003 through May 18, 2004 + 3,640 af Wyoming maximum diversions = 53,760 af.

3,640 af maximum Wyoming diversions divided by 53,760 af total divertible flow = 6.8%.

d. Powder and Little Powder as of July 28, 2006

Wyoming maximum diversions: 37.63 cfs/day of post-1950 rights = 74.51 af/day X 119 days (April 1-July 28) = 8,867 af of direct flow + 64 af storage capacity = 8,931 af.

Total divertible flow: 186,835 af actual total flows measured at point of measurement at Locate, Montana from Oct. 1, 2005 through July 28, 2006 + 8,931 af Wyoming maximum diversions = 195,766 af.

8,931 af maximum Wyoming diversions divided by 195,766 af total divertible flow = 4.6%.

Dated this 30th day of March, 2007.

/s/ Patrick T. Tyrrell
Patrick T. Tyrrell,
Wyoming State Engineer

STATE OF WYOMING)
) SS
COUNTY OF LARAMIE)

The foregoing AFFIDAVIT OF PATRICK T. TYRRELL was subscribed and sworn to before me, a notary public, by Patrick T. Tyrrell this 30th day of March, 2007.

Witness my hand and official seal.

/s/ Kari S. Rayment
Notary Public

My Commission Expires: May 4, 2010

[SEAL]

APPENDIX C

State Engineer's Office

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[LOGO]

DAVE FREUDENTHAL
GOVERNOR

PATRICK T. TYRRELL
STATE ENGINEER

May 24, 2004

Mr. Jack Stults
Division Administrator
Water Resources Division
Department of Natural Resources and Conservation
P.O. Box 201601
Helena, Montana 59620-1601

Dear Jack:

As requested in your letter of May 18, I am providing Wyoming's initial response to the issues you raised within a week of receipt of your letter. I appreciate that this multi-year drought has caused unprecedented low stream-flow in many areas of both of our states. The lack of water is taking its toll on our water users as well and we are experiencing similar conditions to those outlined in your letter. We too are regulating water rights back to the 1880's in the Tongue and Powder River basins, and have numerous pre-1950 rights going unfulfilled. But, that is the priority system – the right to make beneficial use of water, in priority, when it is available. Neither of our states can guarantee a water right will always be fulfilled just because it gets water in more normal years.

Let me begin by saying that there maybe a misunderstanding of the Wyoming Reservoirs Capacity Report we gave you at the April 2004 technical meeting. What the Report intended to present in the first two columns is reservoir capacity, not the actual volume of stored water. The third column is the total of stored water in each reservoir as of October 1, 2003. For example, Park Reservoir has 7,347 acre-feet (a.f.) of pre-1950 and 3,015 a.f. of post-1950 priority water rights. On October 1, 2003, it held only 3,388 a.f., clearly within its pre-1950 priority capacity. I have requested that Mike Whitaker and his staff visit each of the reservoirs that have the potential to store Powder or Tongue River flows. He will be verifying the contents of each of the reservoirs and determining how much has been stored in the current water year under their various priority rights.

Our states have discussed in the past that the Yellowstone River Compact does not provide an explicit mechanism for administration as compared to some of our other compacts. In the mid-1980's, both states delved into the complexities of administration of the Compact, although in the end no formal system was adopted. Clearly, even then, it was understood to be far more complicated than simply releasing water when one party claimed a shortage. Because the Compact itself contains no provision describing how a "call" would occur, we find ourselves as the states' commissioners heading into uncharted territory. While I understand the pressures that led to your sending your letter, it is not at all clear what Wyoming's obligations are in response. I want to be clear that Wyoming is committed to making the Compact work according to its terms, but I am not aware that Wyoming has stored any post-1950 water except when it has had a right to do so.

As I stated earlier, the Compact makes no provision for any state to make a call on a river. The Compact does not apportion direct flow at the state line, nor does it establish or direct the establishment of an interstate priority schedule. In your letter you call "for all pre-1950 junior water in Wyoming to satisfy our senior pre-1950 water on the Tongue and Powder Rivers." I am not sure what you are asking Wyoming to do. Wyoming does not read the Compact as an agreement to deliver any of Wyoming's pre-1950 direct flow water to Montana for Montana's pre-1950 rights. Instead, Article V, Section A, especially when read in conjunction with Article XVIII, simply expresses that the status quo of January 1, 1950 within each state is preserved.

What water is apportioned is specified in Article V Section B, which allocates between the states any water that was not used and not appropriated as of January 1, 1950. On the Tongue, Montana is to receive 60 percent of the post-1950 direct flow water and post-1950 storable water; and on the Powder, 58 percent of the same categories; both measured as provided in the Compact. Wyoming is allocated the remaining 40 and 42 percent which means that we, too, have a significant allocation of and right to the use of post-1950 water.

Once I have a report back from our field personnel (which should be within the next week), I suggest that we talk face-to-face about how to administer the Compact. Because Article V, Section B provides both states with a percentage of unused water, and Article V, Section C provides that the water subject to apportionment be calculated for the current water year only, our work will be of little value unless Montana also provides an accounting of its storage over the same period (since October 1, 2003). We request

that you provide that accounting. Then, I look forward to sitting down with you and your staff to discuss how Article 5 Section B operates. At this meeting, we can explore whether we believe these discussions trigger the conflict resolution procedures outlined in the December 19, 1995 Rules for the Resolution of Disputes, Section II D:

> 'Either state can initiate the dispute resolution process defined in Sections IV, V, and VI, and the other state is obligated to participate in good faith. The states agree that the issues pursued under this dispute resolution process shall be both substantive and require timely resolution.'

I hope that we can come to an understanding about the operation of the Compact without having to invoke formal procedures or elevating the issue unnecessarily. Jack, I know you will be out of the office until June 7 and that Kevin is acting in your stead. Due to the seriousness of the matters outlined in your letter I believe that we as commissioners need to first address some basic Compact concepts before we ask the Technical Committee to become involved. Without fine direction from the commission, it will be difficult for the Technical Committee to make progress. Kevin, or Jack, I look forward to hearing from you to set up a meeting to discuss how the Commission should respond to a call for regulation of this nature. As a start, I will suggest June 7, 8, or 9.

Sincerely,

/s/ Patrick T. Tyrrell
Patrick T. Tyrrell
State Engineer
Commissioner for Wyoming

cc: Governor Freudenthal
Jim Kircher, Chairman and Federal Representative,
Yellowstone River Compact Commission

APPENDIX D

State Engineer's Office

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[LOGO]

DAVE FREUDENTHAL
GOVERNOR

PATRICK T. TYRRELL
STATE ENGINEER

August 9, 2006

Mr. Rich Moy
Acting Division Administrator
Water Resources Division
Department of Natural Resources and Conservation
P.O. Box 201601
Helena, Montana 59620-1601

Dear Rich:

I am providing Wyoming's initial response to the issues Jack Stults raised in his letter of July 28, 2006. As we discussed when Montana sent a similar letter in 2004, this multi-year drought has caused unprecedented low stream flow in many areas of both of our states. The lack of water is taking its toll on our water users as well and we are experiencing similar conditions to those outlined in your letter. We too are regulating water rights back to the 1880's in the Tongue and Powder River basins, and have numerous pre-1950 rights going unfulfilled. Although no formal call for regulation within Wyoming has been received on the mainstem Tongue River, that in no way implies that our pre-Compact rights are being met to any significant degree.

For your information, several tributaries in the Tongue and Powder River basins in Wyoming have been in regulation

this entire irrigation season; Big and Little Goose Creeks for instance never had a right junior to 1883 on at all. In the upper Powder River drainage, regulation is to the Sahara Ditch priority and in the Crazy Woman decree area, only one right is getting water. Piney Creek and Lower Clear Creek have been regulated to pre-1950 rights since mid-June and are now regulated back to 1884. Both Sheridan and Buffalo are on municipal rationing to their water customers. And we have entirely emptied several of our smaller mountain reservoirs and several more will be fully drained in the next few weeks.

Your letter purports the Compact to say things that are clearly only Montana's recent interpretation. Montana's interpretation of Article V, as described in the second paragraph of your letter, is quite different from how the commission, including Montana, has operated in the past. As the administration of the Compact was being analyzed by the two states in the 1980's, it was understood that the only water being apportioned was the post-1950 "unused and unappropriated waters of the interstate tributaries . . ." Montana's more recent stance that the pre-1950 rights in Montana must be met by contemporaneous regulation of post-1950 rights in Wyoming is unsubstantiated by the Compact itself or any of its history. As this position is of your own making, Wyoming feels no obligation to change its long held position regarding the administration of the water rights in place as of the date of the Compact. Montana continues to assert as fact an interpretation of the Compact we have taken great exception to for over two years now. An interstate delivery schedule for pre-1950 rights is not now, and never was, a provision of this Compact.

You suggest in your letter that the Technical Committee should be convened to take action related to water storage in the basin. I must admit that I see some irony in Montana's suggestion of the use of the Technical Committee since it has been difficult in the past to get extensive participation by your staff in the operations of that committee. Wyoming has taken the lead in agenda building, taking notes, distribution of information and other logistics associated with the Committee. After your "call" letter in 2004, Wyoming stood ready to host the Technical Committee and share additional information regarding water operations in the Tongue and Powder River basins in Wyoming. We wanted to show you around and see how we truly operate. Montana twice cancelled these meetings after accepting the invitation and having firm dates selected. If you are seeking cooperation from Wyoming, it has been there.

As the Compact makes no provision for the "call" your letter suggests, it appears in our mutual interest to devise an administration system, much like our states worked on in the 1980's, to address the allocation methods described in Article V.C. We sought to get Montana engaged in this process in 2004, to no avail. Had we succeeded, the work product may not be valuable given the situation we find in 2006.

I find your claimed inability to fill Tongue River Reservoir confusing, as records show Montana released excess amounts from the reservoir during the winter months that would have easily provided the necessary water to fill it. Your own website records show that Tongue River Reservoir was filled to 97 percent of capacity as recently as July 9, 2006. The additional 2,000 (+/-) acre feet of water needed to completely fill would have been there had Montana judiciously managed the reservoir. Wyoming

cannot manage the water once it crosses the state line, only Montana can. And, as long as there is water passing the compact points at the mouth of the Tongue (at Miles City) and Power (at Locate) Rivers, there is evidence of water for allocation under the Compact for both our states. Remember, Montana has over three times the storage in the Tongue River basin for less than half the pre-compact acres, as compared to Wyoming. So, the ability to husband Tongue River flows is far greater in Montana than in Wyoming.

I agree that we can do a better job of collecting, analyzing and sharing information among our two states. That's why Wyoming took the initiative to get an appropriation from our Legislature to gather and analyze more information, contingent upon a similar commitment by Montana. This good faith offer for in kind sharing of these resources was discussed at our Commission meeting in April, and was intended to further our objective understanding of the uses on these rivers. It was also intended to keep these Compact discussions science-based among our professional staffs to forestall unnecessarily elevating any compact issues out of sheer lack of understanding. I now question whether Montana is committed to this objective approach.

In sum, Wyoming will not release stored water for the benefit of Montana, as Wyoming believes it has properly stored that water in accordance with Compact provisions. I will also not agree to the convening of a meeting of the Technical Committee until Montana's Compact Commissioner and I can agree on exactly what it is we want them to do. As the State's Commissioners, we have an obligation to give clear direction to the Technical Committee in order for progress to be made on these difficult, complex issues.

If your new Commissioner wishes to meet to discuss what can be done under the Compact, as written, I'll be there.

Jack's pending retirement leaves me concerned about the continuity of representation from Montana. Working through these difficult interstate issues takes a significant commitment of time and effort on the part of all concerned. I am hopeful that Montana will soon name its replacement to the Yellowstone River Compact Commission so that we can return to constructive dialog. I am confident that such a dialog will move us forward in resolving these difficult matters. Please tell Jack that I do wish him the best after his departure from state government in Montana.

Sincerely,

Patrick T. Tyrrell
State Engineer

Cc: Bill Horak, Chairman, Yellowstone River Compact Commission

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No. 137, Original

4-16-2007

In The
Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

MONTANA'S REPLY BRIEF

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April 2007

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Texas v. New Mexico, 462 U.S. 554 (1983) 7

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OTHER AUTHORITIES

First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), *Kansas v. Nebraska and Colorado*, No. 126, Orig. (2000) 4

HKM Eng'g, Inc., Powder/Tongue River Basin Plan Final Report, Tables III-6, III-9 (2002) 6

Second Report of the Special Master (Subject: Final Settlement Stipulation), *Kansas v. Nebraska and Colorado*, No. 126, Orig. (2003) 8

MONTANA'S REPLY BRIEF

The State of Montana hereby replies to Wyoming's Brief in Opposition to Motion for Leave to File Bill of Complaint (Wyoming's Brief or Wyo. Br.).

I. SUMMARY OF ARGUMENT

Montana seeks interpretation and enforcement of the Yellowstone River Compact (Compact). Wyoming seeks to avoid such interpretation and enforcement. First, Wyoming ignores Montana's claim that Montana's water uses at the time of the adoption of the Compact are protected from later developments in Wyoming. As a result, much of what Wyoming argues is non-responsive to Montana's central claim. Second, Wyoming argues that Montana fails to state a claim, based on Wyoming's interpretations of the Compact and its position that facts have been insufficiently alleged or researched. Factual matters, however, are outside the scope of the proper criteria for assessing a motion for leave. Also, Wyoming's interpretations of the Compact are contrary to the language of the Compact itself, as well as this Court's precedents interpreting similar interstate river compacts. Thus, Wyoming's assertions that the Compact excludes return flows, tributaries and groundwater pumping are untenable. The very existence of such legal disputes between sovereigns confirms the need for the Court to hear this case. Finally, as in other true interstate water compact cases, this Court is the only forum that can provide the relief requested. Wyoming's suggestion to the contrary must be rejected. Montana's Motion for Leave to File should therefore be granted.

II. ARGUMENT

A. Wyoming Ignores Montana's Central Claim.

Wyoming misstates Montana's basic claim, *i.e.*, that the Compact effected a complete apportionment of the Yellowstone River System that protects Montana's pre-1950 rights to the extent they were in use at the time the

Compact was enacted. It follows that when Montana's first-tier, or pre-1950 rights, are unsatisfied, Wyoming must curtail its second-tier and third-tier post-1950 uses in deference. See Montana's Brief in Support of Motion for Leave to File Bill of Complaint (Montana's Brief or Mont. Br.) 11-14. Inexplicably, Wyoming claims that Montana agrees that "these pre-1950 rights are to be administered within each state based only on intra-state prior appropriation. Therefore, this Court need not consider the Compact's first tier allocation under Section A of Article V." Wyo. Br. 2 (citation omitted).

On the contrary, Montana clearly asserts a claimed violation of Article V.A in that Wyoming has used post-1950 water in derogation of Montana's protected pre-1950 rights. See Bill of Complaint ¶¶ 8-13. In fact, the very section of Montana's opening brief cited by Wyoming for its allegation that Article V.A is not at issue, refutes that assertion: "Article V.A of the Compact requires Wyoming to curtail consumption of the water of the Yellowstone River System in excess of Wyoming's pre-January 1, 1950 consumption of such water whenever the amount of water necessary to satisfy Montana's pre-January 1, 1950 uses of such water is not passing the stateline." Mont. Br. 18-19 (quoting ¶ 3 of the Resolution rejected by Wyoming at the Dec. 6, 2006, Yellowstone River Compact Commission (Commission) meeting, reprinted in App. to Mont. Br. 4). This statement describes the practical effect of the apportionment by Article V.A of all waters in use on January 1, 1950. See Mont. Br. 18-20; see also *id.*, at 2-3, 11-16, 22.

Wyoming accepts Montana's description of the three-tier water allocation in the Compact. See Wyo. Br. 2-3. Yet Wyoming's entire brief is framed largely in reference to third-tier water uses, making much of the Wyoming Brief essentially irrelevant and non-responsive to Montana's most fundamental claim, which focuses on protection of Montana's first-tier water rights.

The opening words of the Compact and the language of Article V.A make clear that the water supply for water rights existing in *both* States was *apportioned and protected by the*

Compact, not simply administered under each State's domestic laws without regard to the Compact. Wyoming admits that the States agreed in the Compact that pre-1950 uses "would continue to be enjoyed under each state's water laws." *Id.*, at 2. Wyoming fails to appreciate, however, that the necessary effect of this provision is that Wyoming's post-January 1, 1950 uses must be curtailed when Montana's pre-1950 uses are unmet. Wyoming, being upstream of Montana, is in a position to take water to supply its post-January 1, 1950 (second- and third-tier) water rights first. How else but through curtailment of Wyoming's second-tier and third-tier water rights can the enjoyment of Montana's downstream first-tier rights be protected? Wyoming's Brief ignores this fundamental question.

B. Wyoming's Brief Confirms the Existence of Fundamental Differences Between the States Regarding Interpretation of the Yellowstone River Compact That Only This Court Can Resolve.

Wyoming takes issue with Montana's interpretation of the Yellowstone River Compact. The admitted existence of legal disagreements between the States on questions of Compact interpretation confirms the need for the Court to invoke its original jurisdiction in this case. See *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). In its Statement of the Case, Wyoming reveals immediately the fundamental disagreement between the States on the meaning of the Compact: "Montana's allegations that Wyoming has developed groundwater, sprinkler irrigation systems, new reservoirs, and new irrigated lands since 1950 are allegations of *conduct that does not violate the Yellowstone River Compact*." Wyo. Br. 1 (emphasis added). Thus, Wyoming has asserted as a matter of law that the actions Montana complains of, even if true, do not constitute Compact violations. Wyo. Br. 1; Bill of Complaint ¶¶ 8-12. Wyoming's assertions underscore the need for the Court to grant the Motion for Leave to resolve these

critical differences. Further, Wyoming's assertions are based on an interpretation of the Compact that is inconsistent with the Compact's plain language and with the Court's recent enforcement of similar interstate river compacts.

In addition to its allegations concerning Article V.A, Wyoming claims that the Compact "is intended to deal only with surface waters." Wyo. Br. 15. In support, Wyoming cites an article written in 1975, at a time before the Court had addressed the impact of interstate river compact enforcement on groundwater. *Ibid.* Since then, the Court has held, even where the words "groundwater," "well" or "depletion" do not appear in the compact, the effect of pumping on the compacted surface flows must be accounted for. For example, in *Kansas v. Nebraska and Colorado*, No. 126, Orig., Nebraska moved to dismiss the action because the Compact "does not apportion or allocate consumption of groundwater." First Report of the Special Master (Subject: Nebraska's Motion to Dismiss) 5 (2000). The Special Master recommended that Nebraska's argument be rejected: "The Republican River Compact restricts a compacting State's consumption of groundwater to the extent the consumption depletes stream flow in the Republican River Basin and, therefore, Nebraska's Motion to Dismiss should be denied." *Id.*, at 45. After receiving the Special Master's recommendation, the Court denied Nebraska's Motion to Dismiss. *Kansas v. Nebraska and Colorado*, 530 U.S. 1272 (2000). See also *Kansas v. Colorado*, 514 U.S. 673, 693-94 (1995) ("The Special Master concluded . . . that post-Compact pumping in Colorado had caused material depletions of the usable Stateline flows of the Arkansas River, in violation of the Arkansas River Compact. We agree with this determination. . . . " (brackets, internal quotations and citation omitted)).

Wyoming also asserts that increases in irrigation efficiencies, by the use of more consumptive methods of irrigation, cannot be the basis of a Compact violation. Wyo. Br. 17-20. Wyoming admits, however, that some of its irrigators have switched from flood to sprinkler irrigation, a more consumptive method. *Id.*, at 17-18. Further, Wyoming

claims that its irrigators could legally "consume *all* of what they diverted." *Id.*, at 18 (emphasis in Wyo. Br.). In other words, Wyoming claims that it could eliminate all return flows on which the pre-1950 water rights in Montana have relied. This assertion is directly contrary to the mandate of Compact Article V.A that the water rights in Montana "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." See App. to Compl. 8. Under the doctrine of appropriation, whenever enjoyment of a water right depends on the presence of return flows from upstream users, downstream junior priority appropriators are entitled to resist changes in use which materially affect their rights. Wyoming's law of prior appropriation recognizes this longstanding principle that water users may not "increase the historic amount of water consumptively used under the existing use, nor decrease the historic amount of return flow." Wyo. Stat. Ann. § 41-3-104 (2007); accord *Town of Pine Bluffs v. State Bd. of Control*, 649 P.2d 657, 659 (Wyo. 1982). Removing the return flows on which the downstream Montana water users depend therefore violates the appropriation doctrine recognized in both States and in Article V.A of the Compact.

Wyoming also asserts that the Compact governs only the mainstems of the Tongue and the Powder Rivers, and not their tributaries. Wyo. Br. 21. But the Compact language cannot sustain this position, nor has the Commission ever taken such a limited view.

The Tongue and Powder Rivers are "Interstate Tributaries" pursuant to Article II.F. App. to Compl. 5. Wyoming misconstrues this definition to exclude tributaries of the Tongue and Powder Rivers. Interstate Tributaries are obviously tributaries, and Article II.E defines "Tributary" as "any stream which in a natural state contributes to the flow of the Yellowstone River, including interstate tributaries *and tributaries thereof*." *Id.*, at 4-5 (emphasis added). Thus, the references to the Tongue River and the Powder River necessarily include the tributaries of those

rivers. Wyoming cannot simply write the term "Tributary" out of the term "Interstate Tributaries." The latter term is composed of a defined term which cannot be ignored.

Wyoming's argument also clashes with the Compact's treatment of the Little Big Horn River. The Little Big Horn is not directly tributary to the Yellowstone. Instead it flows into the mainstem of the Big Horn, which then empties into the Yellowstone. Compact Article II.F nevertheless explicitly excludes the Little Big Horn from the definition of "Interstate Tributaries," an exclusion that would make no sense if, as Wyoming claims, tributaries of tributaries were never included in the term in the first place.

Moreover, exclusion of the tributaries of the Tongue and Powder Rivers from the allocations of the Compact would be contrary to the States' intentions "to remove all causes of present and future controversy . . . with respect to the waters of *the Yellowstone River and its tributaries.*" *Id.*, at 1-2 (emphasis added). Thus, the whole fabric of the Compact is at odds with the asserted exclusion of tributaries of the Powder and Tongue Rivers from the Compact.

The longstanding practice of the Yellowstone River Compact Commission includes reservoirs on tributaries of the Tongue and Powder Rivers. See Annual Summary for Yellowstone River Compact Reservoirs or Lakes, reprinted as the App. to this Brief; App. A to Mont. Br. 1-2 (maps showing locations of reservoirs). For example, pursuant to its duties under Article III.C, the Commission collects, correlates and presents factual data on Lake DeSmet, with 197,500 acre-feet of post-1950 storage, water that would otherwise reach the mainstem of the Powder before it enters Montana. Under Wyoming's novel theory, neither Lake DeSmet nor any other reservoirs the Commission itself calls "Compact Reservoirs or Lakes" would be included in the Compact apportionment. All told, Wyoming would exclude from the Compact more than half of stateline flows that originate in the tributaries of the Tongue and Powder Rivers. See HKM Eng'g, Inc., Powder/Tongue River Basin Plan Final Report, Tables III-6, III-9 (2002).

As shown by the foregoing, Wyoming's unilateral and premature interpretations of the Compact are not supported by the Compact language itself. The Court has previously indicated that it considers compact interpretation to be a significant and appropriate function of the Court. See *Texas v. New Mexico*, 462 U.S. 554, 567-568 (1983). The Court has also traditionally allowed for full development of the record before making its determination of the nature and scope of obligations between sovereigns in the exercise of its original jurisdiction. See, *e.g.*, *United States v. Texas*, 339 U.S. 707, 715 (1950). In sum, significant issues of compact interpretation are disputed by the States, are not susceptible to resolution by the States, and need the authoritative determination of this Court.

C. Montana Should Be Allowed to Prove Its Compact Claims.

Wyoming asserts that Montana's claims are improperly pled and that Montana has failed to develop the factual basis for the Complaint. Each of these arguments is irrelevant.

First, Wyoming repeatedly asserts that the Court should deny leave to file Montana's Bill of Complaint because of an alleged lack of specificity in the Bill of Complaint. *E.g.*, Wyo. Br. 1, 5, 7, 10. Wyoming thereby seeks to inject pleading sufficiency as an additional criterion for exercise of the Court's original jurisdiction. Sufficiency of pleading, however, is not one of the criteria set out by the Court as the basis for deciding whether to exercise its original jurisdiction. See *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Even so, Montana has sufficiently pled Compact violations under the normal requirement of a "short and plain statement." See Sup. Ct. R. 17.2; Fed. R. Civ. P. 8. Wyoming is certainly on notice of Montana's claims. See, *e.g.*, Wyo. Br. 10, D-2.

Second, Wyoming argues that Montana has failed to allege injury. *E.g.*, Wyo. Br. 1, 5, 7, 10. Yet Montana specifically alleges that Wyoming has violated the Compact by depriving Montana of water to which it is entitled under

the Compact. Bill of Complaint ¶¶ 8-13. Moreover, in an interstate suit seeking enforcement of an established apportionment of interstate waters, injury other than invasion of a state's compact or decree rights, need not be pled at all. See *Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993) ("In an enforcement action, the plaintiff need not show injury."), *Wyoming v. Colorado*, 309 U.S. 572, 581 (1940); Second Report of the Special Master (Subject: Final Settlement Stipulation), *Kansas v. Nebraska and Colorado*, No. 126, Orig., at DI-19 (2003). In short, Montana has fully pled injury even though it is unnecessary to do so.

Further, Wyoming asks the Court to accept its view of disputed facts as a basis for denying Montana's Motion for Leave to File. But the existence of disputed facts is simply an additional reason that the Court should grant Montana's Motion so that proper trial of such facts can be conducted with the assistance of a Special Master. As the Court said in *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951), "A State cannot be its own ultimate judge in a controversy with a sister State." Wyoming, on the other hand, would have the Court in essence allow Wyoming to be "its own ultimate judge" in this controversy.

The Court should resist Wyoming's premature invitation to decide the relative strength of the evidence at this stage. The purpose of the Motion for Leave is to determine whether Montana should be given a chance to prove its claims. In determining whether the State of Nebraska would be allowed to amend its pleadings against Wyoming, the Court rejected similar arguments: "[A]t this stage we certainly have no basis for judging Nebraska's proof, and no justification for denying Nebraska the chance to prove what it can." *Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995). See also, *Kansas v. Colorado*, 185 U.S. 125, 147 (1902) (overruling demurrer to the bill of complaint on the grounds that Kansas should be allowed to discover facts necessary to prove its case). The present controversy presents a matter of high public importance, and Montana requests that it be given the opportunity to prove its claims.

D. The Compact Commission Is Not An Adequate Alternative Forum.

Wyoming agrees with Montana that "the Yellowstone River Compact Commission is not a forum charged with interpreting the Compact." Wyo. Br. 28. Wyoming nonetheless asserts that the Commission is an adequate alternative forum, apparently because of "Montana's inability to state a case under the Compact." *Id.*, at 29. But whether Montana has "stated a case under the Compact" is considered separately under the "seriousness and dignity" prong of the Court's test, not under the "alternative forum" prong.

Wyoming continues: "If Wyoming had violated the Compact and Montana had credible facts and valid legal arguments establishing such violations, then a dispute over Montana's Compact interpretations should go to this Court, and not the Compact Commission." Wyo Br. 28. Montana is simply asking that it be allowed to show the Court that its facts are "credible" and its legal arguments "valid." Such a showing is not a prerequisite to granting a motion for leave.

Wyoming asserts that the Commission provides a forum to obtain technical data. However, Wyoming never addresses whether the Commission could provide full relief. It cannot. Because the States disagree on the meaning and obligations of the Compact, they are likewise unable to engage in any meaningful information exchange or technical discussions. The Commission is not empowered to enforce the Compact or provide remedies for violations. See Compact, Art. III. Indeed, the Court has never found that an interstate compact commission provides an adequate alternative forum for enforcement of an interstate water compact.

There is no forum other than this Court that can resolve and provide relief for disputes between States with regard to an interstate compact: "To determine the nature and scope of obligations as between States, whether they arise from the legislative means of compact or the 'federal common law' governing interstate controversies, is the function and duty of the Supreme Court of the Nation."

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22, 28 (1951); accord *Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992). No alternative forum exists.

III. CONCLUSION

The State of Montana's Motion for Leave to File Bill of Complaint should be granted.

Respectfully submitted,

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Appendix*

ANNUAL SUMMARY OF CONTENTS FOR YELLOWSTONE RIVER COMPACT RESERVOIRS OR LAKES

[Contents are in acre feet. Reservoirs or lakes are listed in alphabetical order by drainage basin. Symbol: --, data not applicable or not available]

Reservoir or lake name	Pre-Compact 1950 water right	Post-Compact 1950 water right	Usable capacity	Usable contents on Sept. 30, 2004	Usable contents on Sept. 30, 2003	Change in contents
Bighorn River basin						
(Lake) Adelaide Reservoir[1]	1,450	4,760	6,210	800	--	---
Anchor Reservoir[2]	17,410	0	17,410	429	345	84
Bighorn Lake[2]	--	1,312,000	1,312,000	664,300	769,900	-75,600
Boysen Reservoir[2]	701,500	0	701,500	475,100	311,900	163,200
Buffalo Bill Reservoir[2]	456,600	190,000	646,600	438,800	465,700	-26,900
Bull Lake[2]	152,000	0	152,000	88,940	55,620	33,320
Greybull Valley Reservoir[1]	0	33,170	33,170	1,100	1,480	-380
Pilot Butte Reservoir[2]	34,600	0	34,600	15,630	9,290	6,340
Sunshine Reservoir[1]	52,990	0	52,990	6,600	1,800	4,800
Lower Sunshine Reservoir[1]	42,640	42,300	84,940	1,010	1,490	-480
Powder River basin						
Cloud Peak Reservoir[1]	3,400	172	3,570	0	0	0
Dull Knife Reservoir[1]	--	4,320	4,320	504	987	483
Healy Reservoir[1]	--	5,140	5,140	2,620	3,080	-460
Kearney Reservoir[1]	1,850	4,470	6,320	2,500	2,710	-210
Lake DeSmet	37,520	197,500	235,000	185,600	197,600	-12,000
Muddy Guard Reservoir[1]	--	2,340	2,340	0	492	-492
Tie Hack Reservoir[1]	1,650	2,440	2,440	2,440	2,440	0
Willow Park Reservoir[1]	4,460	--	4,460	2,230	1,320	910
Tongue River basin						
Bighorn Reservoir[1]	2,750	1,880	4,630	794	1,030	-236
Cross Creek Reservoir[1]	--	798	798	1	324	-324
Dome Reservoir[3,5]	1,840	188	2,030	1,180	1,480	-300
Granger Reservoir[1]	146	--	146	0	0	0
Last Chance Reservoir[1]	90	--	90	0	0	0
Martin Reservoir[1]	561	--	561	0	0	0
Park Reservoir[1]	7,350	3,070	10,360	4,160	4,150	10
Sawmill Lakes Reservoir[1]	--	1,280	1,280	703	0	703
Tongue River Reservoir[4]	68,000	11,070	79,070	26,620	39,050	-12,430
Twin Lakes Reservoir[1,5]	1,150	2,250	3,400	3,100	2,820	280
Weston Reservoir[1]	370	--	370	0	0	0
Willits Reservoir[1]	79	--	79	0	0	0

[1]Reservoirs managed by the State of Wyoming
[2]Reservoirs managed by Bureau of Reclamation
[3]Data are combined contents of Dome Lake and Dome Lake Reservoir
[4]Reservoir managed by the State of Montana
[5]Data are combined contents of Twin lakes Number 1 and Twin lakes Number 2

*Table from Yellowstone River Compact Commission Annual Report 2004 (Page 20)

No. 137, Original

In the Supreme Court of the United States

STATE OF MONTANA, PLAINTIFF

v.

STATE OF WYOMING
AND
STATE OF NORTH DAKOTA

ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the State of Montana's motion for leave to file a bill of complaint should be granted.

STATEMENT

The State of Montana seeks leave to commence an original action to enforce its rights under the Yellowstone River Compact (Compact). See Act of Oct. 30, 1951, ch. 629, 65 Stat. 663 (approving and reprinting the Compact). (The text of the Compact is appended to Montana's proposed bill of complaint.) The Compact allocates the water supply of the Yellowstone River Basin among the States of Wyoming, Montana, and North Dakota. See Compact Art. V, 65 Stat. 666-668. Montana asserts that the Compact effected a full equitable divi-

sion of the waters of the Tongue and Powder Rivers, tributaries of the Yellowstone River. Compl. ¶¶ 2, 6. Based on that interpretation of the Compact, Montana alleges that Wyoming has depleted Montana's rights under that allocation by allowing various new uses of water in the Tongue and Powder River Basins. Compl. ¶¶ 9-13; Br. in Supp. of Compl. 19. Montana does not seek relief against North Dakota. Compl. ¶ 4; Br. in Supp. of Compl. 3. Wyoming responds that this Court should deny the motion because Montana has failed to state a claim under the Compact or to plead injury with sufficient particularity. See Br. in Opp. 14-17. Wyoming also argues that Montana has an alternative forum for relief in the Yellowstone River Compact Commission. *Id.* at 28-29.

1. The Yellowstone River Basin is an approximately 70,100-square-mile watershed encompassing parts of Wyoming, Montana, and North Dakota. The mainstem of the Yellowstone River rises in Yellowstone National Park, flows north out of Wyoming into Montana, crosses Montana in a northeasterly direction, and joins the Missouri River just inside the North Dakota border, approximately 700 miles from the source. The major interstate tributaries of the Yellowstone for purposes of the Yellowstone River Compact are the Clarks Fork, the Bighorn, the Tongue, and the Powder Rivers. Compact Art. II(F), 65 Stat. 665. Each of those rivers flows through both Wyoming and Montana and joins the Yellowstone River in Montana.

The rights to the waters of two of those tributaries, the Tongue and Powder Rivers, are at issue in Montana's bill of complaint. Each rises in Wyoming's Bighorn Mountains. The Tongue flows approximately 225 miles northeast to its confluence with the Yellowstone

near Miles City, Montana, and its basin covers approximately 5400 square miles. The Powder flows roughly north for approximately 500 miles and joins the Yellowstone at Terry, Montana; its basin encompasses approximately 13,200 square miles. The principal use of water diverted from both rivers is for irrigation within Wyoming and Montana. The Tongue serves as the primary water source for the Northern Cheyenne Indian Reservation, adjacent to the river in south-central Montana.[1]

The other interstate tributaries of the Yellowstone River that are subject to the Compact are the Bighorn River (except for its tributary the Little Bighorn River) and the Clarks Fork. Compact Art. II(F), 65 Stat. 665. The Bighorn River runs approximately 460 miles from its headwaters near Lander, Wyoming, to its confluence with the Yellowstone near Bighorn, Montana. The principal use of the waters diverted from that tributary in both States is for irrigation; much of the irrigation use in Wyoming is through Bureau of Reclamation projects. Bighorn Reservoir, one of several federal reservoirs in the Bighorn River Basin, straddles the state line and is surrounded by the Bighorn Canyon National Recreation Area. The Crow Reservation and the Wind River Reservation are also located in the Bighorn drainage. The 150-mile Clarks Fork rises in southern Montana, runs south into Wyoming, then turns to run northeasterly to its confluence with the Yellowstone near Laurel, Montana. Although no Compact violation is alleged regarding the Bighorn or Clarks Fork, the water rights and water administration in those river basins will be af-

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[1] Under the *Winters* doctrine, *see Winters* v. *United States*, 207 U.S. 564 (1908), the United States holds reserved water rights in trust for the Northern Cheyenne Tribe.

fected by any Compact interpretation established in this litigation.

2. In 1949, Congress authorized representatives of the States of Montana, Wyoming, and North Dakota to negotiate a compact "providing for an equitable division or apportionment between the States of the water supply of the Yellowstone River and of the streams tributary thereto." Act of June 2, 1949, ch. 166, 63 Stat. 152-153. The three States duly reached agreement on December 8, 1950, and the resulting Yellowstone River Compact was subsequently ratified by each of the state legislatures and approved by Congress in accordance with the Compact Clause of the Constitution, Art. I, § 10, Cl. 3. See Act of Oct. 30, 1951, ch. 629, 65 Stat. 663.

As Montana's brief sets out, the Compact establishes a mechanism for dividing the water supply for the Yellowstone River Basin. The preamble declares that the Compact is intended to "remove all causes of present and future controversy between said States * * * with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park." 65 Stat. 663. The preamble further states that the parties "desire[] to provide for an equitable division and apportionment of such waters," and that they acknowledge that "the great importance of water for irrigation" shall be recognized "in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin." *Ibid.*

Article II of the Compact defines relevant terms. The Yellowstone River System is defined as "the Yellowstone River and all of its tributaries, * * * from their sources to the mouth of the Yellowstone." Art. II(D), 65 Stat. 664. "Tributary" means "any stream which in a

natural state contributes to the flow of the Yellowstone River, including interstate tributaries and tributaries thereof." Art. II(E), 65 Stat. 664. The "Interstate Tributaries," in turn, are defined as the Tongue, Powder, Clarks Fork, and Bighorn Rivers. Art. II(F), 65 Stat. 665. The terms "[d]ivert" and "[d]iversion" are defined to mean "the taking or removing of water from the Yellowstone River or any tributary thereof." Art. II(G), 65 Stat. 665. The term "[b]eneficial [u]se" means "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Art. II(H), 65 Stat. 665.

Article III creates the Yellowstone River Compact Commission to administer the Compact as between Montana and Wyoming.[4] The Commission includes one representative of each of the two States. The Director of the United States Geological Survey (USGS) appoints a federal representative (traditionally a USGS employee), who chairs the Commission but has no vote except in case of disagreement between Montana and Wyoming on a "matter necessary to the proper administration of this Compact." Art. III(F), 65 Stat. 665. The Commission's jurisdiction includes the "collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this Compact, and recommendations to [the signatory] States upon matters connected to the administration of this Compact." Art. III(C), 65 Stat. 665. The Commission also has the power to formulate rules and regulations necessary to carry out the provisions of the Compact. Art. III(E), 65 Stat. 666.

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[4] The Commission does not administer the Compact as between Montana and North Dakota. Art. III(A), 65 Stat. 665.

The operative provision, Article V, provides for the division of water between Montana and Wyoming according to a three-tiered framework, as the two States agree in their briefs. Br. in Supp. of Compl. 11-14; Br. in Opp. 2. Article V(A) sets out the first tier: it provides that "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." 65 Stat. 666. The latter doctrine provides that a person who diverts water and puts it to a beneficial use retains the right to that water, on a "first in time, first in right" basis, although only to the extent the water is reasonably required and actually used. See, *e.g.*, *Arizona* v. *California*, 298 U.S. 558, 565-566 (1936).

Article V(B) sets out the second and third tiers. 65 Stat. 666. Of the water that is "unused and unappropriated" as of January 1, 1950, the second-tier allocation gives each State the quantity necessary to provide supplemental water supplies for the first-tier rights. Those supplemental rights, too, are to be acquired pursuant to the doctrine of appropriation. *Ibid.* Once those supplemental rights are satisfied, the third-tier allocation divides any remaining "unused and unappropriated" water between the two States, according to a formula recomputed each water year, with each State receiving a specified percentage of the water of each of the four interstate tributaries. Art. V(B), 65 Stat. 666-667.

The controversy here relates principally to Article V's operative provisions. Articles VI through XI of the Compact appear not to be implicated in the parties' dispute.

3. Montana alleges that Wyoming has increased its use of water from the Powder and Tongue Rivers in several respects since January 1, 1950. First, Montana asserts that fifteen reservoirs have been built in the Wyoming portion of the Powder and Tongue basins since January 1, 1950, increasing storage capacity by approximately 225,400 acre-feet. Compl. ¶ 9; Br. in Supp. of Compl. 14. Second, Montana alleges that new acreage has been put under irrigation in the Wyoming portion of the Powder and Tongue basins. Compl. ¶ 10; Br. in Supp. of Compl. 14. Third, Montana alleges that Wyoming has allowed the construction and use of groundwater wells for irrigation and other uses, including coalbed methane production. Compl. ¶ 11; Br. in Supp. of Compl. 15. Fourth, Montana alleges that Wyoming water users have increased their consumption on existing acreage by implementing new, more water-intensive irrigation methods that reduce the amount of water used for irrigation that makes its way back to the stream. Compl. ¶ 12; Br. in Supp. of Compl. 15-16.

Montana does not allege that Wyoming has violated the Compact merely by allowing these activities. Instead, Montana argues that, as a result of them, it has received insufficient water to satisfy its own rights under the Compact's first-tier allocation, and that Wyoming therefore has violated the Compact by permitting the aforementioned increases in water use while failing to curtail the diversion of water as necessary to protect Montana's rights under the Compact. Compl. ¶¶ 14-16; Br. in Supp. of Compl. 14. The gravamen of Montana's complaint is that in some recent years, there has been insufficient water available in the Powder and Tongue Rivers to satisfy pre-1950 water rights in Montana under the Compact's first tier, see Br. in Supp. of Compl.

17, and that when Montana's first-tier rights are not satisfied there is no "unused and unappropriated" water to be allocated between the States pursuant to the Compact's second and third tiers.[3]

Wyoming asserts that Montana has not established a ripe Compact violation. In Wyoming's view, Montana has not adequately alleged any cognizable injury from Wyoming's use of water. See Br. in Opp. 17, 22-23, 24 (asserting that Montana's groundwater, storage, and increased irrigation claims are unripe). Wyoming also asserts that any increases in water consumption in the Wyoming portion of the Yellowstone River Basin have been permissible under the Compact as Wyoming construes it. See, *e.g.*, *id.* at 15-16 (asserting that the Compact does not cover groundwater); *id.* at 18-19 (stating that increased consumption of water cannot be a Compact violation); *id.* at 21 (stating that the reservoirs identified in Montana's storage claim are not covered by the Compact because they are located on tributaries of the Powder and Tongue, not the mainstems of those rivers).

It appears that, on Montana's own theory, to prevail Montana must establish one or more of the following propositions: that the Compact protects Montana's

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[3] If Montana's allegations are correct, Wyoming's actions might also have affected the rights of the Northern Cheyenne Tribe to waters from the Tongue, which under a compact between Montana and the Tribe (approved by Congress) have a priority date of October 1, 1881. See Mont. Code Ann. § 85-20-301 art. II(A)(2)(a) (2005); see also Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. No. 102-374, § 4(a), 106 Stat. 1187; Compact Art. VI, 65 Stat. 668 ("Nothing contained in this Compact shall * * * affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.").

first-tier rights from infringement by holders of rights under the lower tiers of the Compact; that the Compact requires Wyoming to limit its lower-tier water usage if Montana's first-tier rights are not satisfied; that the Compact limits groundwater pumping if its effect is to deplete the Yellowstone River system of water needed to satisfy Montana's first-tier rights; that the storage of water on tributaries of the Powder and Tongue Rivers under post-Compact water rights must be included in the Compact accounting, and may not deplete flows needed by pre-1950 water rights in Montana; and that the expansion of irrigation and the use of more consumptive irrigation techniques that diminish return flows may violate the Compact if they result in Montana's receiving insufficient water to satisfy its first-tier rights. Montana must also establish a factual predicate for its claim that its asserted rights under the Compact have been violated—*e.g.*, that "in 2004 and again in 2006, Montana experienced severe water shortages in the Tongue and Powder River Basins," and that as a result "Montana's pre-1950 uses were unsatisfied due to shortages at the stateline." Br. in Supp. of Compl. 17.

The States have disputed some of these issues for many years. See Br. in Supp. of Compl. 16-17 (citing disputes going back to 1983). Most recently, in December 2006, the Montana representative to the Compact Commission proposed a resolution adopting Montana's interpretation of the Compact on a number of these disputed points; the Wyoming representative disagreed. See *id.* at 18; Br. in Supp. of Compl. App. A3-A5.

DISCUSSION

The United States suggests that Montana should be granted leave to file its Bill of Complaint. Montana al-

leges an interstate dispute of sufficient importance to warrant this Court's exercise of its original jurisdiction, and there is no other forum in which the controversy practicably can be resolved. Wyoming's challenges to the complaint's legal sufficiency turn on the interpretation of the Compact, and therefore should properly be resolved on their merits; at this threshold stage, Montana has adequately pleaded an injury to its sovereign rights, under its interpretation of the Compact. The United States additionally suggests that this Court may wish to consider potentially dispositive legal issues before referring the matter to a Special Master or taking other action. The resolution of those legal issues, which could be placed before the Court through a motion to dismiss the complaint, could significantly facilitate disposition of the controversy.

I. MONTANA'S BILL OF COMPLAINT ALLEGES A CONTROVERSY THAT WARRANTS THE EXERCISE OF THE COURT'S ORIGINAL JURISDICTION

This Court has original and exclusive jurisdiction over a justiciable case or controversy between States. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(a). That jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas* v. *New Mexico*, 462 U.S. 554, 567 (1983); see, *e.g.*, *New Jersey* v. *New York*, 523 U.S. 767 (1998); *Kansas* v. *Colorado*, 514 U.S. 673 (1995); *Virginia* v. *West Virginia*, 206 U.S. 290, 317-319 (1907). The Court has determined that its exercise of this exclusive jurisdiction is "obligatory only in appropriate cases." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 93 (1972)); see *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995);

Texas v. *New Mexico*, 462 U.S. at 570. In deciding whether to grant leave to file a complaint in a dispute arising under the Court's exclusive original jurisdiction, the Court examines "the nature of the interest of the complaining State," focusing on the "seriousness and dignity of the claim." *Mississippi* v. *Louisiana*, 506 U.S. at 77 (citations omitted). The Court also considers "the availability of an alternative forum in which the issue tendered can be resolved." *Ibid.* Under those standards, Montana's complaint presents a controversy warranting the exercise of original jurisdiction.

A. Montana's Claim Of A Breach Of An Interstate Water Compact Asserts A Substantial Sovereign Interest

In claiming that Wyoming is depriving it of its lawful share of the water of an interstate stream, Montana asserts a substantial sovereign interest that falls squarely within the traditional scope of this Court's original jurisdiction. See, *e.g.*, *Texas* v. *New Mexico*, 462 U.S. at 567-568; *Arizona* v. *California*, 373 U.S. 546 (1963); *Nebraska* v. *Wyoming*, 325 U.S. 589 (1945); *Wyoming* v. *Colorado*, 298 U.S. 573 (1936); *Kansas* v. *Colorado*, 185 U.S. 125 (1902). This Court has recognized that compacts are federal law; that the compact process affords States an amicable alternative to direct litigation in this Court over fact-specific issues, such as the fairest and most just apportionment of water resources; and that disputes concerning the interpretation of compacts therefore are entirely proper for this Court to resolve. The nature of Montana's claims regarding the Yellowstone River therefore appears to be of sufficient "seriousness and dignity," *Mississippi* v. *Louisiana*, 506 U.S. at 77 (quoting *Illinois* v. *City of Milwaukee*, 406

U.S. at 93), to support the exercise of the Court's jurisdiction.

B. The Compact Commission Is Not A Viable Alternative Forum

Contrary to Wyoming's assertion (Br. in Opp. 28-29), the jurisdiction of the Compact Commission does not warrant this Court's staying its hand and denying Montana's motion for leave to file its bill of complaint. Indeed, Wyoming does not argue that the Commission has the authority to render binding interpretations of the Compact and thereby to resolve the dispute between the two States over its construction. Rather, relying on Article III(C), which gives the Compact Commission jurisdiction to collect, correlate and present factual data and maintain records bearing on administration of the Compact, Wyoming asserts that the Commission is the proper forum for developing the *factual* particulars that Wyoming contends Montana needs in order to plead cognizable claims. In Wyoming's view, full development of the facts will show that Montana has not suffered invasion of its protected interests.

Wyoming's argument would invert the customary course of proceedings. The prospect that a claim will fail on the merits is not customarily a reason to reject it at the threshold. Here, moreover, Wyoming does not contend that proceeding before the Compact Commission should be required as a form of exhaustion, or that the Compact Commission has the authority to grant Montana effective relief that might eliminate the need to proceed in a judicial forum. See *Maryland* v. *Louisiana*, 451 U.S. 725, 743 n.19 (1981) (noting that an action in state court was not a viable alternative to proceeding with an original action, because the proposed alternative forum lacked authority to grant full relief). And, even

as to fact-gathering, Montana cannot invoke the assistance of the Commission as a matter of right. New undertakings by the Commission would require the concurrence of the Wyoming representative—or, failing that, the casting of a tie-breaking vote by the representative of the United States (see p. 5, *supra*), a course that the federal government has heretofore eschewed.

Resolving the parties' legal dispute over the interpretation of the Compact will necessarily establish, and potentially narrow, the scope of relevant facts to be determined. If this Court determines that the action should proceed and that fact-finding is appropriate, any Special Master appointed by the Court would have the discretion to structure fact-finding to make full use of the Commission's data and expertise as at least a partial alternative to requiring the parties to engage in traditional discovery.

C. Montana's Complaint Adequately Alleges Injury

Although Montana's assertion of injury lacks detail, it appears to be adequate to state a ripe claim. Montana alleges that in low-water years, and as a result of Wyoming's asserted Compact violations, an insufficient quantity of water has crossed the state line to satisfy its first-tier water rights. Those allegations of past incidents state a cognizable claim of failure to perform under the Compact, which in similar cases has been held to be a sufficient injury to warrant retrospective relief—either money damages or repayment in water. See *Texas* v. *New Mexico*, 482 U.S. 124, 129 (1987). Neither that assertion nor Montana's claim that the dispute is an ongoing one, likely to recur, is facially implausible. Cf. *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1966-1968 (2007) (alluding to the "plausibility standard" that even

notice pleading must meet). Drought in the Western States, including the Yellowstone River Basin, is a relatively regular occurrence.[4]

The pleading requirements for initiation of an original action are not clearly defined. The Federal Rules of Civil Procedure are not strictly applicable in original actions, but provide guidance for the Court's proceedings. See Sup. Ct. R. 17.2; see also, *e.g.*, *Kansas* v. *Nebraska*, 527 U.S. 1020 (1999) (order granting Nebraska leave to file a motion to dismiss "in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure"). Looking here to the Federal Rules, Montana provides the requisite "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Wyoming's objections to the generality of Montana's allegations; its assertion that the failure to plead factual allegations indicates that Montana has developed none; and its attempt to introduce documentary evidence of its own are largely beside

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[4] Montana asserts (Reply Br. 8) that its mere assertion of a Compact violation relieves it of the obligation to show any resulting injury to its individual water users from that violation. When a State complains of a violation of a decree of this Court in an original action, it need not show injury, because the violation may be remedied by contempt even if no affirmative relief to the complaining party is necessary. See *Nebraska* v. *Wyoming*, 507 U.S. 584, 592 (1993); *Wyoming* v. *Colorado*, 309 U.S. 572, 581 (1940). The Special Master in *Kansas* v. *Colorado* determined that a compact should be treated like a decree for these purposes, because the "rights and duties" that a State undertakes pursuant to a compact should not "be harder to enforce than they would be if contained in a decree of the Court." First Report of the Special Master at 69-70, *Kansas* v. *Colorado*, 514 U.S. 673 (1995) (No. 105, Original). This Court did not resolve the issue. See *Kansas* v. *Colorado*, 514 U.S. at 693-694. Because Montana pleads injury to its water users, the question need not be resolved in this case either.

the point at this threshold stage under the Federal Rules of Civil Procedure. And although this Court could establish a different pleading standard in original-jurisdiction cases, it has accepted jurisdiction in other interstate water disputes without requiring the sort of factual specificity in the complaint that Wyoming urges. See, *e.g.*, *Nebraska* v. *Wyoming*, 515 U.S. at 6, 11; Bill of Complaint, *Kansas* v. *Nebraska*, 538 U.S. 720 (2003) (No. 126, Original).

The majority of Wyoming's objections, however, are premised on the notion that Montana has failed to state any injury under a proper interpretation of the Compact. Although Wyoming appears to be correct that this case may turn on interpretation of the Compact, the question whether Montana has properly invoked this Court's jurisdiction is distinct from the question whether Montana has stated a claim.

II. BEFORE REFERRING THE MATTER TO A SPECIAL MASTER, OR TAKING OTHER ACTION, THIS COURT SHOULD RESOLVE THE THRESHOLD LEGAL ISSUES

Upon granting a motion for leave to file a complaint, the Court typically directs the defendant to file an answer, and then refers the matter to a Special Master to conduct any necessary proceedings. In appropriate situations, however, this Court has resolved preliminary or controlling legal issues before, or in lieu of, referring the case to a Master. This controversy presents a situation where that course would be appropriate.

If this action were conducted under the Federal Rules of Civil Procedure, Wyoming could move to dismiss Montana's complaint for failure to state a claim upon which relief may be granted as a matter of law. See Fed. R. Civ. P. 12(b)(6); see also, *e.g.*, 2A James

Wm. Moore, *Moore's Federal Practice* ¶12.07[2.-5] (2d ed. 1996); 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §§ 1355-1356 (3d ed. 2004). Drawing on the Federal Rule as a guide, see Sup. Ct. R. 17.2, the Court may wish to invite the filing of a motion to dismiss in this case.

Two recent original actions have proceeded in this fashion, which has narrowed or even resolved the issues before appointment of a Special Master. In *New Hampshire* v. *Maine*, the defendant State was permitted to file "a motion to dismiss on res judicata grounds." 530 U.S. 1272 (2000). Maine argued that the complaint was wholly barred by res judicata, collateral estoppel, and judicial estoppel. *New Hampshire* v. *Maine*, 532 U.S. 742, 748 (2001). This Court agreed with the judicial-estoppel ground and granted the motion to dismiss New Hampshire's complaint. *Id.* at 756. See also *Wyoming* v. *Oklahoma*, 488 U.S. 921 (1988) (denying Oklahoma's motion to dismiss without referring it to a Special Master, and ordering Oklahoma to file an answer); *United States* v. *California*, 375 U.S. 927 (1963) (denying California's motion to dismiss); *United States* v. *Louisiana*, 338 U.S. 806 (1949) (overruling Louisiana's demurrer without referring it to a Special Master).

In an even more factually analogous case, the State of Kansas sought leave to file a bill of complaint based on Nebraska's allowing groundwater pumping, which Kansas alleged to violate the Republican River Compact. Nebraska disputed whether the Compact applied in any way to limit its pumping of groundwater. The Court accordingly granted Nebraska "leave to file a motion to dismiss, in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, limited to the question whether the Republican River Compact

restricts a state's consumption of groundwater." *Kansas* v. *Nebraska*, 527 U.S. at 1020. See generally U.S. Br. at 16-19, *Kansas* v. *Nebraska*, 538 U.S. 720 (No. 126, Original). The Court subsequently referred the motion to dismiss to a Special Master, and on his recommendation denied it. 528 U.S. 1001 (1999); 530 U.S. 1272 (2000).[5]

This course of action is particularly appropriate where, as here, the complaint seeks a definitive interpretation of an interstate compact. This Court's "object in original cases is to have the parties, as promptly as possible, reach and argue the merits of the controversy presented," and to that end the Court will dispose of antecedent legal questions at the earliest stage "feasible." *Ohio* v. *Kentucky*, 410 U.S. 641, 644 (1973). Here, the antecedent questions of compact interpretation are susceptible of resolution using well-established tools of construction. The Court would first examine the text of the Compact. An interstate compact is both a contract and a law of the United States. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Texas* v. *New Mexico*, 482 U.S. at 128. As with other federal laws, if the text, read in light of its context, is unambiguous, it is conclusive. See, *e.g.*, *Kansas* v. *Colorado*, 514 U.S. at 690 ("We conclude that the clear language of [the Arkan-

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[5] See also, *e.g.*, *United States* v. *Alaska*, 501 U.S. 1248 (1991) (permitting original action to proceed on stipulated facts); *United States* v. *Louisiana*, 363 U.S. 1, 12-13 (1960) ("Both sides have presented in support of their position a massive array of historical documents, of which we take judicial notice, and substantially agree that all the issues tendered can properly be disposed of on the basis of the pleadings and such documents."); *United States* v. *Louisiana*, 339 U.S. 699, 702-704 (1950) (ruling based on facts alleged in complaint and admitted in answer); *United States* v. *California*, 332 U.S. 19, 21-24 (1947) (same).

sas River Compact] refutes Colorado's legal challenge."); see also *Texas* v. *New Mexico*, 462 U.S. at 567-568 ("[O]ur first and last order of business is interpreting the compact."); *New Jersey* v. *New York*, 523 U.S. at 781-785; *Central R.R.* v. *Jersey City*, 209 U.S. 473, 478-479 (1908). If the Court finds the text ambiguous, it may also consider other reliable documentary indicia of the parties' intent, including materials submitted to Congress in support of congressional approval. See *Oklahoma* v. *New Mexico*, 501 U.S. at 235 n.5; *Texas* v. *New Mexico*, 462 U.S. at 568 n.14; *Arizona* v. *California*, 292 U.S. 341, 359-360 (1934). In appropriate circumstances the Court may also take judicial notice of historical documents bearing on the dispute. See, *e.g.*, *United States* v. *Louisiana*, 363 U.S. 1, 12-13 (1960). And to the extent the parties' practical construction of the Compact bears on its meaning, see *New Jersey* v. *New York*, 523 U.S. at 830-831 (Scalia, J., dissenting) (collecting cases); cf. *Nebraska* v. *Wyoming*, 507 U.S. 584, 592 (1993) (parties' course of conduct may be relevant in interpreting decree), the Court could also consider appropriate documentation, such as the Compact Commission's annual reports.[6]

In addition, an interstate water dispute of this type is particularly likely to benefit from an early judicial determination narrowing or even resolving the contested legal issues before the parties engage in fact de-

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[6] Although a motion to dismiss may become somewhat more complex if it relies on materials extrinsic to the compact itself, this Court has commonly accepted and relied on some such materials in treaty cases. See, *e.g.*, *Air France* v. *Saks*, 470 U.S. 392, 396 (1985). And the Court always retains the option of appointing a Special Master to assist in resolving the motion to dismiss. See, *e.g.*, *Kansas* v. *Nebraska*, 528 U.S. at 1001.

velopment. Cf. *Twombly*, 127 S. Ct. at 1967 (noting the expense involved in proceeding past the pleading stage to discovery); *Ohio* v. *Kentucky*, 410 U.S. at 644 ("[I]n original cases," this Court will, "where feasible, * * * dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear."). Interstate water disputes pose complex trial-management problems once they proceed past the pleading stage. Cf. *Nebraska* v. *Wyoming*, 515 U.S. at 8-9. The factual issues involved in such disputes implicate complex principles of hydrology, geology, engineering, and economics, which must be applied with respect to great expanses of varied terrain and land and water uses. Discovery, trial preparation, and trial concerning such issues tend to be very complicated, time-consuming, and expensive. See, *e.g.*, First Report of the Special Master (four volumes), *Kansas* v. *Colorado*, 514 U.S. 673 (1995) (No. 105, Original).

Consequently, the United States suggests that the Court grant Montana leave to file its complaint, and simultaneously grant Wyoming leave to file a motion, in the nature of a motion under Rule 12(b)(6), with respect to the issues of compact interpretation that Wyoming deems dispositive. Because the Federal Rules of Civil Procedure are merely guidance for the Court in original actions, the Court may tailor procedures to facilitate its decision-making process. See *United States* v. *Alaska*, 501 U.S. 1248 (1991); *United States* v. *Alaska*, 501 U.S. 1275 (1991). If the Court decides to grant Wyoming leave to file a motion to dismiss, the United States suggests that the Court may wish to set a schedule for the motion and supporting brief, opposition, and reply, and to impose appropriate page limits for the briefs. Furthermore, because the Court's rules do not expressly

permit the filing of a brief as amicus curiae in support of or in opposition to a motion to dismiss, the Court may wish to grant prospective amici leave to file such briefs within a reasonable time after the motion is filed. Cf. Sup. Ct. R. 37.2(a) (brief as amicus curiae in support of a motion for leave to file a bill of complaint to be filed within 60 days after the motion is filed).

CONCLUSION

The motion of the State of Montana for leave to file a bill of complaint should be granted. The Court may wish to grant the State of Wyoming leave to file a motion to dismiss, in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted.

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Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING and
STATE OF NORTH DAKOTA,

Defendants.

WYOMING'S MOTION TO DISMISS BILL OF COMPLAINT

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MOTION TO DISMISS BILL OF COMPLAINT

The State of Wyoming ("Wyoming"), by and through its Attorney General, Bruce Salzburg, respectfully moves to dismiss the Bill of Complaint filed by the State of Montana ("Montana") on grounds that it fails to state a claim upon which relief may be granted under the terms of the Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951) (Appendix A to Montana's Proposed Bill of Complaint) ("the Compact," cited below as "YRC"). Wyoming more fully states the grounds for its motion in the accompanying Brief in Support of Motion to Dismiss Bill of Complaint.

BRIEF IN SUPPORT OF MOTION TO DISMISS BILL OF COMPLAINT

STATEMENT OF THE CASE

In January of 2007, Montana filed a Motion for Leave to File Bill of Complaint, Bill of Complaint ("complaint"), and Brief in Support. Wyoming filed a brief in opposition, to which Montana replied. Upon this Court's invitation, the Solicitor General of the United States filed a brief as amicus curiae. After receiving these briefs, this Court granted Montana's motion to file, but also allowed Wyoming to file "a motion to dismiss, in the nature of a motion under Rule 12(b)(6), Federal Rules of Civil Procedure." Order List, 552 U.S. ___, 127 ORIG. (Feb. 19, 2008).

As between Montana and Wyoming, the Compact applies to the surface waters of four sub-basins of the Yellowstone River: the Clark's Fork, Big Horn, Tongue and Powder River Basins, which lie in both of those states. YRC art. II, § D (the "Interstate Tributaries").[1] Montana alleges that Wyoming has violated Article V of the Compact only as to the Tongue and Powder Rivers, their tributaries, and storage reservoirs in their two basins. Compl. ¶¶ 2, 3, 5-17; YRC art. V. The Tongue and Powder Rivers originate in the Big Horn Mountains in Wyoming and join the Yellowstone River only after flowing many miles through Montana. (*See* Mont. Br. in Support of Motion to File Bill of Complaint 3-4 and Apps. A-1 and A-2 thereto (maps)).

Montana's claims under Article V of the Compact are based on two premises, both of which are outside the intent of the Compact's drafters.

First, Montana alleges that by building reservoirs, putting new acreage under irrigation, changing to more consumptive irrigation methods, and allowing groundwater pumping in the Tongue and Powder River Basins since January 1, 1950, Wyoming has depleted the two rivers more than it depleted them as of January 1, 1950. Compl. ¶¶ 8-13. In short, Montana assumes that the Compact is a "depletion" type

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[1] The Compact's provisions that regulate the Yellowstone River's allocation between Montana and North Dakota are not discussed in this motion. *E.g.*, YRC art. V ¶ D.

of compact that guarantees river flows at the state lines as those flows existed as of January 1, 1950. Wyoming contends that the drafters expressly rejected the depletion concept in favor of a divertible flow concept, so claims based on depletion or consumption must be dismissed.

Second, Montana alleges that Wyoming must shut off diversions along these rivers and their tributaries that serve post-1950 Wyoming water rights whenever the flow in Montana becomes too low to supply pre-1950 Montana water users to divert the amounts they need as of January 1, 1950. *Id.* ¶ 8. Montana thus asserts that the rule of interstate prior appropriation applies to post-1950 Wyoming diversions based on daily flow calculations. Wyoming contends that the drafters rejected any limitations on post-1950 Wyoming diversions calculated on a daily basis, but instead allocated post-1950 diversions between the two states under a modified divertible flow system, which only limits Wyoming diversions through cumulative annual measurements. By adopting the modified divertible flow system, the drafters rejected any regulation of water diversions across state lines under the doctrine of prior appropriation. Since Montana has not claimed that Wyoming has allowed, or will allow, diverters with post-1950 water rights to exceed the cumulative annual measurements set by the Compact, it has failed to state a claim on which relief can be granted.

STATEMENT OF FACTS MATERIAL TO THE QUESTIONS PRESENTED

To resolve these basic disagreements, the Court should review Article V, the drafting history of the Compact, and the manner in which the states have interpreted the Compact since 1951. Before analyzing this history, however, three foundations of the states' negotiations must be reviewed – how Wyoming and Montana regulated water use in their own states, how this Court had decided disputes between western states over interstate rivers and streams, and the types of compacting schemes Wyoming had entered into on other rivers.

A. The Prior Appropriation Doctrine in Wyoming and Montana

When representatives of Wyoming and Montana met in the 1930s to make a first attempt to draft a compact for the Yellowstone River, both states based their intrastate water laws on the prior appropriation doctrine – first in time, first in right. WYO. CONST. art. 8, § 3; *See Murray v. Tingley*, 50 P. 723, 725 (Mont. 1897). In its very first legislative session in 1890, the Wyoming Legislature codified a sophisticated prior appropriation law based on recorded paper permits and certificates of appropriation. 1890-1891 Wyo. Sess. Laws 100-01. After 1890, a Wyoming irrigator had to obtain a permit from the state engineer before diverting water from a stream. WYO. STAT. ANN. § 41-4-501 (2007). The permit would specify the land to be irrigated, the diversion point, and the

source of the water. *Id.*; WYO. STAT. ANN. § 41-4-502 (2007).

To perfect a water right, the irrigator had to put the water to beneficial use as specified in the permit, and then prove that use in a formal adjudication by the Wyoming Board of Control.[2] WYO. STAT. ANN. §§ 41-4-201, 41-4-511 (2007); *See* Mark Squillace, *A Critical Look at Wyoming Water Law*, 24 LAND & WATER L. REV. 307, 309-10, 321-23 (1989). Wyoming's system continues today with little change. *Compare* 1890-1891 Wyo. Sess. Laws 100-01 *with* WYO. STAT. ANN. § 41-4-511 (2007).

Although Montana also follows the prior appropriation doctrine, as of 1950 it lacked a centralized permit system like the Wyoming system. Most Montana water rights were "use rights," which irrigators obtained by simply putting water to use, without any permits of public record. *Dep't of State Lands v. Pettibone*, 702 P.2d 948, 951 (Mont. 1985). The Montana Legislature reformed this ad hoc system in 1973, when it established water courts to conduct general adjudications of water rights on Montana's rivers. *See id.* A Montana water court has completed an adjudication of rights on the Powder under the 1973 Act,

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[2] The Wyoming Board of Control is comprised of the division superintendents from each of Wyoming's four water divisions and the Wyoming State Engineer. WYO. CONST. art. 8, §§ 2, 4. The state engineer presides at Board meetings, and also has general supervisory authority over the waters of the state. *Id.* art. 8, §§ 2, 5.

and has issued a preliminary decree of adjudication for the Tongue. YELLOWSTONE RIVER COMPACT COMM'N, FIFTY-FIFTH ANNUAL REPORT viii (2006); Montana Department of Natural Resources and Conservation, http://dnrc.mt.gov/wrd/default.asp (follow "adjudication" hyperlink under "Water Rights").

In a mass adjudication of rights, a water court accepts proof of historical irrigation and other uses in a river basin. After providing notice and a process that allows objections by other users, the court declares all the rights on the river in a written decree. MONT. CODE ANN. §§ 85-2-212 through 85-2-250 (2005). The decree provides state regulators with the type of documentation of rights that would approach the documentation Wyoming has had since 1890 for its rivers as a result of its system of filed water rights. MONT. CODE ANN. §§ 85-2-234, 85-2-236 (2005); WYO. STAT. ANN. § 41-4-511 (2007).

B. Judicial Apportionment of Interstate Streams

As representatives of Montana and Wyoming entered into negotiations in the 1930s, there existed two general theories of how interstate streams should be regulated between prior appropriation states in the absence of a compact – interstate prior appropriation, and equitable apportionment. In *Bean v. Morris*, this Court held that under federal common law the rule of prior appropriation applied across state lines if both states followed the prior appropriation doctrine.

Bean v. Morris, 221 U.S. 485, 487-88 (1911), *aff'g Morris v. Bean*, 159 F. 651 (9th Cir. 1908), *aff'g Morris v. Bean*, 146 F. 423 (C.C. Mont. 1906). Thus, a senior user in one state could theoretically make an interstate call to shut off a diversion by a junior user in another state. *Id.* However, the Court did not state how such a call could be administered across state lines, an especially difficult problem when the two states have different administration systems, as do Wyoming and Montana.

In 1922, this Court applied the *Bean* rule to a great extent in the equitable apportionment case of *Wyoming v. Colorado*, 259 U.S. 419, 458, 471, 484, (1922). This Court held that division of an interstate stream should be based on equitable considerations, and imposed a duty on states sharing an interstate stream to exercise their water rights reasonably and in a manner calculated to conserve supply. *Id.* However, the Court's allocation generally supported senior use in Wyoming, the downstream state. A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated and Restated*, 56 U. COLO. L. REV. 381, 395 (1985).

In 1945, this Court's decision in *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945), cast doubt on whether the prior appropriation rule would be the predominant factor when the Court determined how interstate waters should be judicially apportioned among several states, even when those states followed that rule within their own boundaries. *See* Tarlock, *supra*, at 400-02. After *Nebraska*, western

states faced significant uncertainty as to how the judiciary would equitably apportion a river in a particular case.

For Wyoming and Montana to establish a practical system to share the interstate tributaries of the Yellowstone in a manner they both considered equitable, they needed a compact. *See* YRC preamble (Montana, North Dakota and Wyoming entered into the Compact "desiring to provide for an equitable division and apportionment" of "the waters of the Yellowstone River and its tributaries.").

C. Interstate Apportionment Compacts Before the Yellowstone River Compact

The Yellowstone River Compact was the first and only water apportionment compact that Montana has entered into with another state. 4 DOUGLAS L. GRANT, WATERS AND WATER RIGHTS, § 46.01, at 46-2 (Robert E. Beck ed., 1991). Wyoming, however, began Yellowstone River Compact negotiations in 1932 after it had already entered into the Colorado River Compact of 1922 with six other states. *Id.* at 46-3. Also, during the course of the Yellowstone River Compact negotiations from 1932 through 1950, Wyoming was negotiating the Snake River Compact with Idaho, the Belle Fourche River Compact with South Dakota, and the Upper Colorado River Basin Compact with Arizona, Colorado, New Mexico and Utah. *Id.*; Snake River Compact, 64 Stat. 29 (1950); Belle Fourche River

Compact, 58 Stat. 94 (1944); Upper Colorado River Basin Compact, 63 Stat. 31 (1949).

Wyoming has entered into three types of compacts – compacts based on prior appropriation, depletion, and divertible flow.[3] The Colorado River Compact is a depletion compact, which allocates water based on "specified quantities of water measured in terms of beneficial consumptive use." Richard A. Simms, Leland E. Rolfs & Brent E. Spronk, *Interstate Compacts and Equitable Apportionment*, 34 ROCKY MTN. MIN. LAW FOUND. INST. § 23.02[2] (1988); *see also* JEROME C. MUYS, INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL-INTERSTATE COMPACT 11-12 (National Water Comm'n 1971). Under the Colorado River Compact, Wyoming and the states of Colorado, New Mexico and Utah are restricted from depleting the flow of the Colorado River below a fixed amount of water at a dividing line between the upper and lower basins of the river at Lee Ferry, Arizona. Sections (a) and (d) of Article III of that compact state:

> (a) There is hereby apportioned from the Colorado River System in perpetuity to

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[3] In the Upper Niobrara River Compact of 1969, Wyoming agreed to a compact with Nebraska that employs the rule of prior appropriation under which certain direct flow rights in Wyoming and Nebraska are regulated based on their priority dates as if the state line did not exist. Richard A. Simms, Leland E. Rolfs & Brent E. Spronk, *Interstate Compacts and Equitable Apportionment*, 34 ROCKY MTN. MIN. LAW FOUND. INST. § 23.02[2] (1988).

> the Upper Basin and Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.
>
> . . .
>
> (d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

Colorado River Compact of 1922, *approved by Congress*, Boulder Canyon Project Act of 1928, 43 U.S.C. § 617*l*.

Thus, a depletion compact restricts an upstream state from depleting a river below a certain quantity of flow at the state line, even in low flow periods. In such periods, the upstream state may have to reduce its consumptive use of water. Each state's percentage of the total yield of the basin may vary, but the downstream state's quantity is preserved.

In contrast to the Colorado River Compact, the Yellowstone River Compact, Snake River Compact, and Belle Fourche River Compact are based on the

divertible flow principle, rather than depletion.' Under the divertible flow concept, stream flow is apportioned "in terms of specified diversion rights measured in fixed percentages of the available flow." MUYS, *supra*, at 11-12; *see also* R. Simms et al., *supra*, § 23.02[2]. The upstream state is not limited as to how much it can deplete the flow at the state line, and its own consumption or depletion of the river is not the measure of compliance. Rather, both states agree to limit certain diversions to a fixed percentage of the available flow, so the percentages to each state remain the same, while the amount of water actually diverted by each state varies with the size of the runoff.

Under most compacts, whether based on depletion or divertible flow, water rights established in each state before the compact is completed are excluded from the allocation. MUYS, *supra*, at 12 and n.22. As will be explained below, this is true of the Yellowstone River Compact.

Wyoming's State Engineer L.C. Bishop acted as Wyoming's lead commissioner in the negotiation of the Upper Colorado River Basin Compact, Snake River Compact, and Yellowstone River Compact. WYO.

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[1] Simms et al., *supra*, § 23.02 n.25 (identifying Yellowstone, Snake and Belle Fourche River Compacts as divertible flow compacts); *see also* MUYS, *supra* 11-12 n.19 (identifying Yellowstone, and Snake River Compacts as divertible flow compacts); Belle Fourche River Compact, 58 Stat. 94 (1944); Snake River Compact, 64 Stat. 29 (1950).

STAT. ANN. §§ 41-12-601, 41-12-501, 41-12-401 (2007). Mr. Bishop and the other drafters of the Yellowstone River Compact were well aware of the alternative compacting methods available to them. *See* Appendix 86 ("App."); App. 59, 61-62.

D. Yellowstone River Compact Negotiations: 1932-1950

1. The 1935 Draft

Under the Compact Clause of the United States Constitution, states are not free to enter into compacts without the consent of Congress. U.S. CONST. art. I, § 10, cl. 3. Montana and Wyoming first received such consent to negotiate a compact for the Yellowstone River on June 14, 1932. Pub. L. 178, 47 Stat. 306 (1932).[7] Compact commissioners from Wyoming, Montana, and the federal government met twice between 1933 and 1935 and signed a nine-article draft compact on February 6, 1935. App. 1-2, 7-8.

With the following language, the draft generally incorporated the theory of interstate prior appropriation established in *Bean v. Morris*, 221 U.S. 485 (1911): "[T]he use of such waters [the waters of the Yellowstone River and tributaries] is subject to

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[7] Although the Yellowstone River enters North Dakota for a short distance before joining the Missouri, this first statute did not authorize North Dakota's participation. Pub. L. 178, 47 Stat. 306 (1932). Congress eventually authorized North Dakota to join the negotiations. App. 11, 80; Pub. L. 632, 54 Stat. 399 (1940).

appropriation for beneficial use under the laws of the separate states and under general water-right law as interpreted by the Courts." App. 7. Under this language, a downstream irrigator in one state could presumably force an upstream irrigator in another state with a later water right to curtail a diversion in times of shortage. However, the draft compact lacked terms to define how this priority would be administered under "general water-right law as interpreted by the Courts," leaving such essentials to a commission. App. 8. Although signed by the commissioners, the draft was never presented to either the Montana or the Wyoming Legislatures for approval. App. 80.

2. The 1942 Draft

After receiving Congress's approval to restart negotiations, Pub. L. No. 237, 50 Stat. 551 (1937), Wyoming, Montana and the federal government formed a new nine-member compact commission. App. 2. This commission issued a preliminary report noting that Yellowstone River Basin runoff was sufficient to "meet all existing and potential consumptive uses if and when a comprehensive plan of storage has been developed and put into effect." App. 10. It found it to be "essential that additional storage be constructed at strategic points at the earliest possible date." App. 11.

In 1940, Congress extended the deadline to conclude a compact, and added a North Dakota delegation. The commission expanded from 9 to 21

members, met in 1941 and 1942, and signed a draft compact on December 31, 1942. Pub. L. No. 632, 54 Stat. 399 (1940); App. 5, 16-19.

The 1942 draft fundamentally diverged from the 1935 draft. It jettisoned the concept of interstate prior appropriation and replaced it with the divertible flow principle. App. 18. The commissioners defined "divertible flow," as:

> [T]he quantity of water that could be diverted from the streamflow above a designated point of measurement during a specified period of time. It is comprised of three elements: (a) the total net inflow to storage; (b) the total diversions; and (c) the remaining flow in the stream at the designated point of measurement for which the divertible flow is being determined[.]

App. 17, art. II, § I.

The 1942 draft employed the *daily* divertible flow method. On any specific date during the irrigation season, the draft would have allocated to each state by percentages, *all* divertible flows. App. 18-19. It did not exclude diversions to irrigators with existing rights. App. 18-19.

To implement the compact in a river basin, Montana and Wyoming regulators would have had to determine the "mean divertible daily flow" in that basin on each day of the irrigation season. App. 18-19. "Mean divertible daily flow" was defined as "the

average divertible flow occurring during a twenty-four hour period, beginning at 12:00 midnight." App. 17. The regulators would have had to measure the surface water diverted by each of their users through headgates or pumps from the river and its tributaries.[*] *See* App. 17, art. II, § I(b). To that total, they would have added net gains, or subtracted net losses, in storage reservoirs in the basin. *See* App. 17, art. II, § I(a). Finally, they would have added the quantity of water that flowed past a point of measurement on the river. *See* App. 17, art. II, § I(c).

The administrators would then have applied percentages to the total mean divertible daily flow to determine how much should be diverted in each state on a particular day. App. 18-19. The drafters awarded small allocation percentages to Montana in the Tongue and Powder Basins because Wyoming had most of the senior irrigation rights in those basins at that time. (Montana received 28% of the first 2,200 acre-feet of mean divertible daily flow from the Tongue, and received 3.5% of the first 2,000 acre-feet from the Powder). App. 12, 14, 18-19.

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[*] A headgate is a diversion structure, often made of concrete, which allows an irrigator to control the flow from a stream or canal into a ditch through an adjustable gate. Because of the measurable opening, a headgate allows the irrigator or local hydrographer to accurately estimate the flow rate. An irrigation pump is a mechanical pump, usually powered by diesel fuel or electricity, that allows irrigators to divert water directly from the channel of a stream through a pipe in measurable amounts.

After the commissioners of the three states signed the 1942 draft, it was presented to the Wyoming Legislature in 1943. However, the Wyoming Legislature amended the draft to remove the Tongue and Powder Rivers from its coverage, and the Montana and North Dakota Legislatures would not accept it as amended. App. 28-29.

While there are important distinctions between the 1942 draft and the final Compact enacted in 1951, the 1942 draft established several core principles that appeared again in the final Compact. (1) the 1942 draft allocated water based on divertible flow, not depletion or consumption schemes that prevailed in other compacts; (2) the 1942 draft rejected an interstate prior appropriation scheme under which diversions in one state would be shut down to satisfy particular diversions in another state under the command of a single regulatory body; and (3) the 1942 draft only allocated surface water. App. 16-19.

3. The 1944 Draft

In 1944, Congress renewed its authorization for compact negotiations. Pub. L. No. 257, 58 Stat. 117 (1944), and the commission reformed with 29 members, many of whom were veterans of the 1942 attempt. App. 22-23. On December 18, 1944, the commissioners signed a new draft compact. App. 25.

The 1944 draft was similar to the 1942 draft, retaining a daily divertible flow allocation method based on mean divertible daily flow. App. 25. Once

upon depletions intended for appropriations through individual wells, and groundwater exempt were absent. App. 22-25.

A minor change provided that the divertable flow allocations which would remain unperfected on the Tongue for a period of ten years after compact passage, or until Tongue River Reservoir began storing sufficient water to supplement natural flow, which ever came first. App. 24, art. V, ¶ 3(b).

The revised 1944 compact was presented to the legislatures of the three states in early 1947. App. 80. This time, the Wyoming Legislature joined the Montana and North Dakota Legislatures in passage of it. However, Wyoming Governor Lester Hunt vetoed the bill, killing the 1944 draft. App. 80.

4. Negotiation of the 1951 Compact

On June 2, 1949, Congress again authorized compact negotiations. Pub. L. No. 81-63, 63 Stat. 152 (1949). The new federal representative to the commission was Ed Nowell, a recently retired Regional Director of the Bureau of Reclamation. App. 33. The commission expanded from 20 to 28 members. VIII Proceedings.

The full commission held four meetings over a period of 13 months in 1949 and 1950 before reaching unanimous agreement on the Compact on December 8, 1950. App. 68. The legislatures of the three states approved it in early 1951, and Mr. Nowell submitted

it to Congress on March 16, 1951, together with his report recommending its passage. WYO. STAT. ANN. § 41-12-601 (2007); MONT. CODE ANN. § 85-20-101 (2005); N.D. CENT. CODE § 61-23-01 (2005); App. 78-85. Both the Senate and House took up bills for approval of the Compact, and referred them to their respective committees for interior and insular affairs. The bills passed both houses, and the Compact became the law of the United States in October, 1951. YRC.

Sections A, B, and C of Article V of the Compact are the sections at issue in this case. The overall intent of Article V, and the specific intent of its three components, is best shown by tracing the history of each component. Section A covers the drafters' treatment of diversions or storage serving water rights that were established in each state on or before January 1, 1950. The first clause of Section B covers the drafters' treatment of diversions begun after January 1, 1950 to provide supplemental water to existing pre-1950 water rights. Finally, the second clause of Section B, and Section C, cover the drafters' treatment of water diverted or stored for the satisfaction of water rights established in each state after January 1, 1950.

a. History of Article V, Section A: Pre-1950 Diversions and Reservoir Storage

Section A of Article V of the Compact, which provides that pre-1950 diversions will be managed by

each state under its own water laws, was one of the easiest parts of Article V for the commissioners to draft. It states:

> A. Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

YRC art. V, § A.

At its second meeting, on February 1 and 2, 1950, the commission discussed basic principles it wished to establish before assigning drafting to the drafting committee. App. 37-38. During this discussion, the commission considered whether it should rely on the 1944 draft, as the 1944 commission had relied on the 1942 draft. The commission chose to make a clean break, however, and asked federal attorney W.J. Burke to prepare a draft that "should be a completely new start, built from the ground up." App. 39.

The commission instructed Mr. Burke to create a new draft ("Burke's draft") on two foundations. He should: (1) recognize existing water rights in Montana and Wyoming and provide that they remain unimpaired by the compact; and (2) allocate water by percentages to each state to serve future water uses. App. 38. The commissioners gave Mr. Burke tentative language for each of the four interstate tributaries to use as a model. The Tongue River clause stated:

TONGUE RIVER

1. Appropriative rights to the beneficial uses of the water of the Tongue River system existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

2. Wyoming and Montana agree that the unappropriated waters of the Tongue River system subsequent to January 1, 1950, shall be allocated to each state as follows:

60% to Montana
40% to Wyoming

App. 40.

Though it considered several alternative drafts over the ensuing ten months, the commission ultimately based Article V of the final Compact on the structure of the Tongue River clause that it had given to Mr. Burke at the February, 1950 meeting. The only change to Part 1 of the commission's tentative language before it became Section A of the final Compact was the replacement of "Tongue River system," with "Yellowstone River System," so that it covered all the interstate tributaries and their tributaries. YRC art. V, § A.

The intent of Section A is to preserve existing water rights in each state "unimpaired" by the Compact. App. 38. This answered the concerns of the

Wyoming delegation who had opposed the percentage allocation of all diversions because senior Wyoming rights on the Tongue River might suffer from enforcement of the allocations. App. 26.

At the commission's October, 1950 meeting, Montana proposed language that would have resurrected a concept from the 1935 draft to regulate existing diversions. App. 60, 63-64, 65. Montana proposed that existing diversions on the rivers be managed by interstate prior appropriation, dividing them "on the basis of priorities thereunder as single streams and regardless of state lines." App. 65. This would have meant that a Montana irrigator diverting water to satisfy a pre-1950 right, could, through an interstate call, shut down an upstream irrigator with a later priority date, even if that upstream irrigator was across the state line in Wyoming. Montana fought to include this concept in the compact at the October, 1950 commission meeting, but failed to overcome Wyoming's objection. App. 63, 65; YRC art. V, § A. The first part of the Tongue River Clause from Burke's draft, remained in the Compact. App. 43; YRC art. V § A.

In summary, the negotiating history confirms that Section A of Article V had a simple purpose – to carve diversions and storage for pre-1950 rights out of the rest of the Compact so that such diversions and storage could be regulated by each state just as they had been regulated within each state before 1950.

The simple purpose of Section A is also confirmed in Wyoming Senator Joseph O'Mahoney's committee report to the United States Senate, in which he emphasized the ease of administering the compact compared to earlier drafts. He wrote: "The compact provisions are easily administered, and require no elaborate organization. In all respects, it presents an unusually practicable solution to the problems which, during the early years of negotiations, seemed highly complicated and difficult." App.76.

The commission's removal of pre-1950 water rights from the Compact's percentage allocations was one of these simplifications that eased administration and obviated the need for elaborate organization, such as an interstate regulatory body. Compact Commission Chairman Newell, the lead federal representative on the commission, explained the advantage of excluding pre-1950 diversions from Compact regulation in his report to Congress:

> *In earlier attempts to arrive at a compact and in the early meetings here reported, there was searching discussion as to whether the agreement sought on division of waters should include the water now appropriated and in use or should apply only to the unappropriated and unused balance which is available for further development. The latter principle was decided on (art. V-A) for several reasons.* First, it would be a huge and time-consuming task to determine and fix comparable values for existing rights in three States with differing water laws and

> practices in establishing water rights. Second, the basic fact that there is enough water if properly conserved by storage to take care of all existing and all feasible future developments points up the importance of arriving promptly at the simplest workable agreement that would permit such storage projects to proceed. When these are built, even the operation provisions of the compact are expected to become easy of administration.

App. 83-84 (emphasis added).

Congressman Clair Engle of California, who drafted the House committee report on the Compact, reiterated this point: "Extensive studies by an engineering committee, appointed by the commission to advise it, disclosed that little could be gained, from a water-supply standpoint by attempting, in the compact, the regulation and administration of existing appropriative rights in the signatory States." App. 71.

In 1953, the Montana Legislature passed an act that further confirms the Compact's exclusion of pre-1950 rights from interstate regulation. 1953 Mont. Laws 173. While part of the Montana act required Montana irrigators to measure and report *post-1950* diversions so that those diversions could be administered under the percentage allocation scheme in Sections B and C of Article V, another clause of the act specifically exempted Montana irrigators from measuring or reporting their diversions to serve *pre-1950* rights. MONT. CODE ANN. §§ 85-20-102, 85-20-104 through 85-20-106 (2005). This section of the

Montana law, entitled "Status of prior rights," states: "The rights to the beneficial use of any water of any interstate tributary of the Yellowstone River acquired prior to and including January 1, 1950, shall not be impaired by or subject to this part." MONT. CODE ANN. § 85-20-107 (2005). Thus, the 1953 Montana Legislature confirmed the Compact's basic structure that excluded pre-1950 rights from regulation. There was no reason to identify or measure diversions that served those pre-1950 water rights.

b. History of the First Clause of Article V, Section B: Supplementation of Pre-1950 Water Rights

The first clause of Section B of Article V of the Compact addresses diversions commenced after 1950 that supplement pre-1950 water rights. It states:

> B. Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory State such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation[.]

YRC art. V, § B.

As explained above, federal attorney Burke's draft had two essential provisions – it grandfathered existing rights, and it allocated water to serve future rights. At the commission's third meeting in October, 1950, the commission asked the engineering committee to provide for a third category of diversions – those established after January 1, 1950, that would provide supplemental water to existing (pre-January 1, 1950) rights. App. 49, 62. As the commission explained in its minutes: "Some consideration must be given to supplemental water supply and since such water is for use on existing projects, it is felt that such allocation should be made under the category of existing irrigation works rather than potential." App. 62. Consistent with this charge, the engineering committee included in its draft a paragraph that excluded from the compact future diversions of water that would supplement pre-1950 rights. This paragraph was located in Section E, 2 of Article V. App. 49.

When considering the engineering committee draft at its final meeting in December of 1950, the commission decided to move the clause excluding supplemental rights from Section E to Section B of Article V. App. 66-67. This occurred because Mr. Burke believed that there existed an "ambiguous situation in the language of paragraph B respecting supplemental water rights[.]" App. 66. He therefore suggested rewriting Section B to include what is now the first clause of Section B that deals with supplemental water for pre-1950 rights. App. 67. The commission agreed to move the supplemental water

clause out of the exclusions and into Section B, and to accept Mr. Burke's new draft of the clause. During the discussion leading to this vote, Mr. Burke explained the general structure of the compact which justified placing the discussion of supplemental water for pre-1950 rights in Section B, immediately after Section A, where the commission treated pre-1950 rights. App. 66.

> Mr. Burke discussed the basis on which the Compact was drafted and the general theory of the Compact. Yields of the basin are to be burdened by (1) existing appropriative rights and (2) supplemental water for existing developments. The remainder, the unappropriated and unused water, or residual water, is to be compacted.

App. 66.

It is clear from the commission's minutes, that the drafters did not intend by this move to alter their treatment of supplemental supply, but still intended that water supplementing existing rights would be treated in the same manner as existing rights. Diversions for existing rights, and to supplement existing rights, should both be enjoyed under each state's prior appropriation laws, and excluded from the diversions allocated by percentage under clause 2 of Section B and Section C of Article V. App. 66.

c. History of the Second Clause of Article V, Section B and Article V, Section C: Allocation of Post-1950 Diversions and Storage by Cumulative Annual Percentage

Beginning with the Tongue River Clause it discussed in its meeting of February, 1950, the commission separated water diversions and reservoir storage for post-1950 water rights from diversions and storage relating to pre-1950 rights. It allocated these post-1950 rights by percentages between the states. This concept now appears in the second clause of Section B, and Section C, of Article V of the Compact, which state:

> B. . . . and the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows:
>
> . . .
>
> 3. Tongue River
>
> a. To Wyoming _ _ _ _ _ _ _ _ _ _ 40%
>
> To Montana _ _ _ _ _ _ _ _ _ _ 60%
>
> b. The point of measurement shall be below the last diversion from the Tongue River above its junction with the Yellowstone River.

4. Powder (including the Little Powder River)

a. To Wyoming 42%

To Montana 58%

b. The point of measurement shall be below the last diversion from the Powder River above its junction with the Yellowstone River.

C. The quantity of water subject to the percentage allocations, in Paragraph B 1, 2, 3 and 4 of this Article V, shall be determined on an annual water year basis measured from October 1st of any year through September 30th of the succeeding year. The quantity to which the percentage factors shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:

1. The total diversions, in acre-feet, above the point of measurement, for irrigation, municipal, and industrial uses in Wyoming and Montana developed after January 1, 1950, during the period from October 1st to that given date;

2. The net change in storage, in acre-feet, in all reservoirs in Wyoming and Montana above the point of measurement completed subsequent to January 1, 1950, during the period from October 1st to that given date;

> 3. The net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950, during the period October 1st to that given date;
>
> 4. The quantity of water, in acre-feet, that passed the point of measurement in the stream during the period from October 1st to that given date.

YRC art. V.

As instructed by the commission in February of 1950, Mr. Burke completed a draft compact and submitted it to the drafting and engineering committees on August 22 and 23, 1950. App. 45. Burke's draft provided in Article V that existing water rights established under state law would remain unimpaired by the compact, and that unappropriated waters would be allocated by percentages to new uses. App. 42-44. As in the 1942 and 1944 drafts, Burke's draft measured allocations of "divertible flow" for new uses based on "mean daily divertible flow." App. 41, 42.

During the commission's discussions at the October, 1950 meeting, the engineering committee recommended that if the divertible flow principle was adopted for post-1950 rights, it should be modified "to make the apportionment operative on other than a daily basis so that allocation could be in terms of

cumulative volumes of water through an entire year, or portion thereof rather than by daily stream flow." App. 62. The commission accepted this recommendation, and passed a formal motion to adopt the modified divertible flow method, which eliminated the 1942 and 1944 daily divertible flow constructions. App. 64. Montana's State Engineer and commissioner, Fred Buck, specifically agreed to this modified method at that meeting. App. 64. His agreement in 1950 was consistent with his earlier misgivings about daily divertible flow under the 1942 draft due to the practical difficulty of measuring all diversions along a river during a single 24-hour period. App. 20. *See also* App. 29-30 (Wyoming commissioner E.C. Gwillim's similar concerns about the impracticality of daily divertible flow).

Between the October meeting, and the final commission meeting on December 7 and 8, 1950, Mr. Burke and the engineering committee fleshed out the new compact as instructed ("the engineering committee's draft"), and presented it to the commission at its final meeting. App. 47, 66. Sections B and C of Article V in the engineering committee's draft adopted the modified divertible flow method. App. 47-49. These two sections allocated, by percentages to each state, diversions and storage that would serve any future water rights established after January 1, 1950. App. 47-49. Since the allocations were to be made on the "modified" cumulative annual basis, the engineering committee removed definitions for "mean daily divertible flow," and "mean daily flow," from its draft, and

the final Compact reflects these deletions. VIII art II

In Sections B and C of Article V of its draft, the engineering committee established how, as of any given date in a water year, water diverted to post 1928 uses would be allocated under the modified divertible flow method. App. 47-49. In Section C, the committee specified how the cumulative total divertible flows in each river basin would be measured. App. 48-49. In Section B, it stated the percentages of these divertible flows to be allocated to each state. App. 47-48.

At its final meeting, the full commission added the supplemental water clause to the beginning of Section B of Article V, without changing the substance of the clause establishing the allocation percentages for post 1928 diversions. App. 66-67. Also, at its final meeting, the commission approved the engineering committee's draft of Section C, with only a minor semantic adjustment. App. 67.

In his committee report, Congressman Engle of California summarized the Compact's adoption of the modified divertible flow concept:

> In paragraph C of article V, there is adopted a modified version of the divertible flow principle. Under the formula adopted, the apportionments stated in paragraph B are made operative in terms of cumulative volumes of water throughout a water year, fixed as

> October 1 of any year through September 30 of the succeeding year[.]

App. 72.

The actions of Wyoming and Montana since 1951 confirm that they agreed to the modified divertible flow principle. Wyoming's L.C. Bishop and Earl Lloyd, and Montana's Fred Buck, all of whom participated in drafting the Compact, represented their states on the Yellowstone River Compact Commission continuously from 1951 through 1962. In each of those 11 years, through water surplus and drought, including one of the worst droughts in the basin's history in 1954, these commissioners reported in their official annual reports that the states declined to measure cumulative divertible flows, because they agreed that Wyoming had not exceeded its percentages under the modified divertible flow principle embodied in the Compact. App. 87, 88. If Montana thought then that the Compact provided for daily divertible flow comparisons, or interstate calls by pre-1950 Montana irrigators to shut off individual Wyoming irrigators, Montana never made such claim.

d. The Drafters' Explicit Rejection of the Depletion Principle

As an alternative to the modified divertible flow principle, the 1949/1950 commission considered the depletion principle contained in many other western water compacts, but rejected it. Engineering Committee Chairman Myers, an employee of the federal

Bureau of Reclamation, proposed the depletion principle at the August 1950 joint meeting of the commission's engineering and drafting committees. App. 45-46. He stated that the simplest kind of compact, which was most practical and easy to administer, would be a depletion compact that puts "a ceiling on the depletion to take place upstream[.]" App. 45-46. Mr. Myers drafted a depletion compact that he circulated to the engineering committee at its September 27, 1950 meeting. App. 51. He incorporated the depletion concept in Article V of his draft through his use of the phrases "consumptive use," "depletions," and "inflow-outflow method" as follows:

> A. There is hereby apportioned from the Yellowstone River System in perpetuity to the States of North Dakota, Montana, and Wyoming, respectively, exclusive of established rights and other uses coming within the provisions of paragraph D of this Article V, the consumptive use per annum of water, as follows:
>
> [here, Myers had blanks for percentage allocations to Montana and Wyoming on the four interstate tributaries and to Montana and North Dakota on the Yellowstone River proper]
>
> B. The apportionment made to the respective States by paragraph A hereof shall be determined on an annual water year basis measured from October 1 of any year through September 30 of the succeeding year.

C. The consumptive use of water, which use is apportioned in paragraph A hereof, shall be determined for each State by the inflow-outflow method in terms of man made depletions in addition to existing depletions as of January 1, 1951.

D. There are hereby excluded from the provisions of this Compact:

1. Existing and future domestic and stock water uses of water: *Provided*, That the capacity of any reservoir for stock water so excluded shall not exceed 10 acre-feet.

2. Established rights to the beneficial use of water in each signatating [sic] State existing on January 1, 1951, including losses from reservoirs constructed prior to January 1, 1951.

App. 55-56.

The engineering committee recommended rejection of the Myers depletion draft in a letter to Commission Chairman Newell. App. 58. At its October 1950 meeting, the full commission considered the depletion concept but rejected it by formal vote. App. 61-62. During discussion of the motion, Montana stated that it favored the divertible flow approach over the depletion concept. App. 62.

In his 1951 report to Congress accompanying the final Compact, Chairman Newell emphasized the commission's choice of divertible flow over depletion:

> In determining the amount of water subject to the allocation, the "divertible flow" principle was chosen over the "depletion" principle, because the former had been used in earlier negotiations and was more familiar to the commissioners, who were assured by the consultants that the latter had no outstanding advantages even though it had been selected on the upper Colorado.

App. 84. In 1976, 1983, and 1989, a later generation of Montana water managers reaffirmed that the Compact is based on divertible flow, not depletion.[1]

Since the 1970s, water managers from both states have discussed methods of data collection to monitor compliance with the cumulative divertible flow allocation of post-1950 rights. However, Wyoming commissioners disagreed when Montana began to raise the new interpretations it now asserts in its complaint. Apps. C and D to Wyoming's Brief in

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[1] App. A to Wyoming's Brief in Opposition to Motion for Leave to File Bill of Complaint at A-5 (Letter and white paper from Orrin Ferris, Administrator of the Water Resources Division of the Montana DNRC to Wyoming State Engineer (1976) ("The compact is explicit in allocating waters based on diversions rather than depletions, in fact, return flows are never mentioned."); App. 90 (DAN ASHENBERG, A COOPERATIVE PLAN TO ADMINISTER THE YELLOWSTONE RIVER COMPACT, (Water Resources Division, Montana DNRC Draft report Nov. 1983) (the Compact "apportions flow based on diversions, not on depletions."); App. 91 (MONTANA DNRC, YELLOWSTONE RIVER COMPACT 32 (Nov. 29, 1989) ("The apportionment formula in Article V is based on diversions and not depletions.").

Opposition to Motion for Leave to File Bill of Complaint.

SUMMARY OF ARGUMENT

This Court should dismiss all of Montana's claims. The language of the Compact, and its drafting history, establish that the commissioners intended to create a divertible flow compact, not a depletion compact. There is no basis for Montana's claim that the Compact restricts Wyoming's ability to deplete flows of the Tongue or Powder River in order to protect water levels at the state line as they existed on January 1, 1950. Montana's other allegations based on the depletion principle – that Wyoming has improperly increased irrigated acreage, built new reservoirs, replaced flood irrigation with more efficient sprinkler irrigation, and drilled groundwater wells – are also based on a theory that the drafters rejected.

The drafters intended that the Compact's percentage allocations would only apply to water diverted, stored, or divertible from the interstate streams and their tributaries for the satisfaction of post-1950 water rights. Diversions to serve pre-1950 water rights, and to supplement pre-1950 rights, are not to be counted for the percentage allocation, but instead regulated by each state under its own water laws. In October of 1950, the drafters rejected for good Montana's proposal that pre-1950 rights be

regulated based on a prior appropriation scheme that ignored state lines. Therefore, the drafters intentionally withheld from the Compact any directive or mechanism by which a water user in Montana could make an interstate "call" to shut down the diversion of a Wyoming water user whose rights were junior to a Montana user's right.

In determining how to allocate divertible flow among post-1950 water rights in each state, the drafters could have selected the daily divertible flow concept that had appeared in the 1942 and 1944 draft compacts. Instead, the drafters expressly rejected the daily concept and selected a "modified" divertible flow method for this allocation. Under this method, water diversions serving post-1950 rights are to be counted on an annual *cumulative* basis. Wyoming can violate its allocation only if its cumulative post-1950 diversions and net gains in storage exceed Wyoming's percentage of the cumulative divertible flow from October 1 through a given date.

Montana does not allege such a violation. Montana's claims are an attempt to have this Court create a hybrid of a depletion compact, pure prior appropriation compact, and daily divertible flow compact, each of which the drafters expressly rejected. This Court should dismiss the complaint.

ARGUMENT

A. Standard of Review

In deciding this motion in the nature of a motion to dismiss, this Court must focus on Montana's allegations in paragraphs 8-13 of its complaint where Montana states how it believes Wyoming violated, or will violate, the Compact. FED. R. CIV. PRO. 12(b)(6), SUP. CT. RULE 17.2. If Montana has failed to state a claim upon which relief can be granted under the Compact as a matter of law, this Court should dismiss this case. FED. R. CIV. PRO. 12(b)(6). A compact is a contract, as well as a law of the United States. *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991). In order to interpret a compact, the Court must examine the text and move on to review other reliable documentary evidence if it finds ambiguity. *Id.* The Court's goal is to discern the intent of the drafters. *Id.*

In previous original cases, this Court has relied on historical documents to decide motions to dismiss. *New Hampshire v. Maine*, 532 U.S. 742 (2001); *United States v. Louisiana*, 363 U.S. 1, 12-13 (1960); *Arizona v. California*, 292 U.S. 341, 359-60, (1934). In *Louisiana*, this Court took judicial notice of "a massive array of historical documents," in deciding a motion to dismiss on the pleadings. *United States v. Louisiana*, 363 U.S. at 12-13. The Court stated that it agreed with the parties that "all the issues tendered can properly be disposed of on the basis of the pleadings and such documents." *Id.* In this case, the historical documents that provide context and confirm

the intent of the Compact drafters and Congress are not massive. The Court should consider them to fulfill its objective of reaching the merits of this original case as early as possible. *See Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

B. Montana's Interpretation of the Compact is Fundamentally Flawed

Montana alleges in paragraphs 8 through 13 of its complaint how it believes Wyoming has violated, or will violate, the Compact. Analysis of the first and the last of these six paragraphs reveals the fundamental flaws in all of Montana's claims.

Montana alleges that:

> Wyoming refuses to *curtail consumption* of the waters of the Tongue and Powder Rivers in excess of Wyoming's consumption of such waters existing as of January 1, 1950, *whenever the amount of water necessary to satisfy Montana's uses of such waters existing as of that date is not passing the Wyoming-Montana stateline*, in violation of Montana's rights under Article V of the Compact.

(Compl. ¶ 8) (emphasis added).

Montana further alleges that: "By undertaking and allowing the aforementioned actions, the State of Wyoming has *depleted and is threatening further to deplete* the waters of the Tongue and Powder Rivers allocated to the State of Montana under Article V of the Compact." (Compl. ¶ 13) (emphasis added).

Montana thus asserts that the Compact is a combination of: (1) a depletion compact, which restricts Wyoming water consumption to levels of consumption "as of January 1, 1950"; (2) an interstate prior appropriation compact that subjects individual diverters in Wyoming to an interstate call to satisfy individual diverters across the state line in Montana; and (3) a compact whose allocations to post-1950 diversions are based on a daily comparison of particular diversions on the river, rather than percentages of cumulative total divertible flows. The drafters intended none of these features.

1. The Drafters Rejected the Depletion Principle

The history of the negotiation of the Yellowstone River Compact confirms that the drafters chose a modified divertible flow compact and rejected the depletion principle. Through their experience with other compacts, the drafters were aware that the interstate tributaries of the Yellowstone River could be regulated in various ways, including based on the depletion principle. App. 84. Mr. Myers of the Bureau of Reclamation offered his depletion draft at the October, 1950 commission meeting, but the commission rejected it by formal vote. App. 61-62. Commission minutes reveal that the engineering committee expressly considered the two compact types and explained the differences to the full commission before the commission voted:

> Two principles were considered for use in the preparation of the draft. The first is the depletion theory used in the Upper Colorado River Compact, which places a ceiling on the beneficial consumptive use of water permitted in each state. The second is the divertible flow theory which limits the amount or percentage of total amount of water which can be diverted in a state. The Committee believed that a modification of the divertible flow principle was most appropriate in this case, this being the principle considered in all previous compact negotiations on the Yellowstone.

App. 59.

The commission's choice of modified divertible flow over the depletion concept has been reiterated by federal representative Newell, representatives of the states, and many commentators ever since.[8]

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[8] App. 84. (Commissioner Newell's report to Congress); App. A to Wyoming's Brief in Opposition to Motion for Leave to File Bill of Complaint at A-5 (Orrin Ferris, Administrator of the Water Resources Division of the Montana DNRC to Wyoming State Engineer (1976)); App. 90 (DAN ANDERSEN, A COOPERATIVE PLAN TO ADMINISTER THE YELLOWSTONE RIVER COMPACT, (Water Resources Division, Montana DNRC Draft report Nov. 1983)); App. 91 (MONTANA DNRC, YELLOWSTONE RIVER COMPACT 32 (Nov. 29, 1989); Floyd A. Bishop, *Interstate Water Compacts and Mineral Development* (Administrative Aspects), 21 ROCKY MTN. MIN. LAW INST. 801, 802 (1975); Richard A. Simms, Leland E. Rolfs & Brent E. Spronk, *Interstate Compacts and Equitable Apportionment*, 34 ROCKY MTN. MIN. LAW FOUND. INST. § 23.02[2] n.25 (1988).

Thus, Wyoming's diversions of water from the interstate tributaries and their tributaries cannot violate the Compact by depleting an interstate tributary below some mythical daily delivery guaranteed at the state line. The final Compact makes no provision for measuring flows at a state line gauge, which would be necessary to enforce a depletion compact that makes such a guarantee. Also, the Compact does not provide for an accounting of depletions or consumptive use in either state as is required in other depletion compacts. *See, e.g.*, Upper Colorado River Basin Compact art. VI, WYO. STAT. ANN. § 41-12-401 (2007). Montana did not get a depletion compact, and its many allegations about Wyoming's depletion or consumption of water lack any legal basis.

2. The Drafters Rejected the Interstate Prior Appropriation Model

The Compact does not create a system of prior appropriation that would rely on interstate calls administered by an interstate body that would apply some sort of general law of prior appropriation. Wyoming and Montana had several chances to base the compact on interstate prior appropriation, but declined. The 1935 draft, based entirely on interstate prior appropriation theory, failed. And Montana's attempt to insert interstate prior appropriation language in Section A of Article V failed in 1950. App. 65; YRC art. V, § A.

As to diversions supplementing pre-1950 rights, the drafters intended these diversions to be excluded from percentage allocation, and to be regulated the same as pre-1950 rights, that is, under each state's own laws. The Commission explained in its minutes: "Some consideration must be given to supplemental water supply and since such water is for use on existing projects, it is felt that such allocation should be made under the category of existing irrigation works rather than potential." App. 49, 62; *see also* 66-67 (Mr. Burke's discussion of how the supplementation clause fits in the Compact's structure). The final Compact is consistent with these deliberations, the commission's rejection of the 1935 draft, and the commission's 1950 rejection of Montana's interstate prior appropriation clause. The Compact contains no provision under which supplemental supply is restricted or allocated across state lines. The drafters intended the states to regulate both pre-1950 diversions, and supplementation of those diversions, under their own laws, unimpaired by the Compact.

3. The Drafters Rejected Daily Divertible Flow in Favor of Modified Divertible Flow

As Mr. Burke explained during the commission's last edits to the final Compact, the water not serving pre-1950 rights "is to be compacted." App. 66. The drafters expressly selected the modified divertible flow principle to allocate this water. YRC art. V, § B, clause 2, § C. This principle relies on *cumulative*

measurement and percentage allocation. Wyoming cannot violate the Compact based on some daily comparison of rights on either side of the state line. The states discarded any provision for the daily summation of diversions when the 1944 draft died. As noted in the minutes of the commission's third meeting on the final Compact:

> Mr. Myers asked specifically whether the Commission wanted to operate on a daily basis or on an annual basis, subject to check as required. Mr. Bower moved to have operations on an annual basis with provisions to make a check at any time desirable, but not required on a daily basis. The motion was seconded. In respect to the question, Mr. Buck [Montana's lead commissioner] stated he agreed to the annual basis with provision to check as required. The motion was passed.

App. 64.

Montana had several good reasons not to fear the Compact's modified divertible flow principle. Wyoming can violate this allocation method if its total diversions and net gains to storage for post-1950 water rights, from October 1 through a given date in the water year, exceed its percentage of the total cumulative divertible flow in a basin. On the other hand, if, from October 1 through any given day, all of Wyoming's post-1950 diversions and storage gains do not exceed its percentage allocations of 40% on the Tongue River or 42% on the Powder River, then that must be because Montana has diverted to post-1950

water rights, and allowed to flow out the bottom of each river, at least 60% of the cumulative total divertible flow on the Tongue River, and 58% on the Powder River. The cumulative divertible flow, by definition, equals 100% of the combined cumulative divertible flows of the two states. If Wyoming is not in violation because it has not exceeded its cumulative percentage, the modified divertible flow method ensures that Montana has, at a minimum, of the total divertible flow to work with to satisfy its irrigators.

Properly managed by Montana, the expected new Bureau of Reclamation reservoirs (at Moorhead on the Powder, Yellowtail on the Big Horn, and expected expansion of Montana's Tongue River Reservoir on the Tongue, would allow Montana to make use of its percentage share of the cumulative divertible flows in dry summer months to satisfy both its pre-1950 rights and its post-1950 rights. It is no surprise that much of the expected storage has been created. Yellowtail Reservoir astride the Wyoming and Montana border in 1961, and the Tongue River Reservoir expansion in 1999. United States Bureau of Reclamation, http://www.usbr.gov/dataweb/html/yellowtail.html; HYDRO SOLUTIONS, INC., TONGUE RIVER HYDROLOGY REPORT, 28 (2002), http://mgs.doa.state.mt.us (follow "Reports" hyperlink; then follow "2002 Tongue River Hydrology Report" hyperlink). Compact Commissioner Newell reported to Congress in 1951 that the satisfaction of all surface water users' rights on these rivers depended on the construction of storage. App. 83-84, 85-86. The drafters refused to enact a

convoluted system of depletion accounting and interstate calls that Montana now suggests, because they expected that Montana would develop and properly manage its storage, and thereby obtain satisfaction from its generous percentages of divertible flow.

If this Court were to ignore the assumptions of the drafters about storage solving Montana's timing concerns, and effectively rewrite the Compact to allow Montana to demand water that Wyoming's post-1950 users are properly diverting within Wyoming's percentage share, then Montana could manipulate its water administration to unfairly harm Wyoming. For example, on the Tongue River, Montana could drain Tongue River Reservoir early in the irrigation season to satisfy post-1950 diversions, leaving insufficient water to satisfy its pre-1950 rights later in the season. Then, when the river flows are diminished and cannot satisfy pre-1950 users, it could force Wyoming to shut down its post-1950 users in order to make water available at the headgates or pumps of pre-1950 Montana users. Under Montana's theory, this could occur even if Wyoming's total cumulative post-1950 diversions and net gains in storage in the Tongue River Basin are less than its 40% allocation of the total divertible flow. The compact commission, and the congressional committees, believed that Montana would use storage as a shield for pre-1950 Montana users against late season low flows. App. 85-86. They did not give Montana the sword of *daily* divertible flow theory with which to abuse Wyoming.

Significantly, when the 1942 and 1944 commissioners drafted daily divertible flow versions that placed all water rights under percentage allocation, they allotted to Montana small percentages – 28% of the first 2,200 acre-feet divertible each day from the Tongue, and 3.5% of the first 2,000 acre-feet divertible each day from the Powder. These small percentages to Montana diverters made sense, since those draft compacts attempted to allocate all divertible flows, to both pre-1950 and post-1950 rights, between the states. Few of the existing water rights were in Montana. App. 12, 14 (1940 FPC report). If the 1942 and 1944 commissions had given Montana higher percentages of all the water, Wyoming's existing rights would have been diminished.

In the final Compact, the drafters gave much larger percentages to Montana: 60% on the Tongue and 58% on the Powder. This is consistent with Article V's provisions that allocated only post-1950 diversions by percentage, while grandfathering pre-1950 rights. The higher percentages to Montana in the final Compact were based on development potential only, since water for existing rights was excluded from the percentage allocations.

Now, Montana wants the best of both worlds. It wants high percentages of the 1951 Compact, but also wants to employ the daily scheme from the rejected 1942 and 1944 drafts to force post-1950 Wyoming diversions to cease diverting on particular days, even if Wyoming is cumulatively well within its 40% allocation. If Wyoming had agreed in 1950 to a repeat

of the daily divertible flow scheme of the 1944 compact, it surely would have insisted on the smaller percentages for Montana. Montana is not entitled to the higher percentages it received in the final Compact without also accepting the modified divertible flow system to which the percentages are linked.

The modified divertible flow method, as accepted by Montana, is simple, and could, under the appropriate circumstances, support a claim against Wyoming for its violation. Montana may initiate a claim by asserting that Wyoming is violating its cumulative percentage allocation as of a given date. To test this, each state would collect its measurements under subsections 1-4 of Section C of Article V, including: (1) all water diverted to post-1950 rights, (2) net changes in storage between October 1 and the given date for each post-1950 reservoir, (3) net changes in storage in pre-1950 reservoirs to the extent committed to serving post-1950 rights, and (4) the amount of water that passed the bottom of the particular river since October 1. YRC art. V, § C. Montana and Wyoming would then share these measurements and add them up. They would multiply this "cumulative total divertible flow" by their percentage limits to reach the amount of water measured in acre-feet that they were allowed between October 1 and the given date. YRC art. V, § C. They would then compare their allowance to the total cumulative amount of diversions and storage that occurred in their own states through the given date. In Wyoming's case, it would be in violation if its cumulative diversions and storage through the given

date exceeded its 40% of the total cumulative divertible flows on the Tongue, or 42% on the Powder. YRC art. V, § B.

To be enforced, the Compact requires the states to collect data over the entire water year. Flows at the points of measurement under Section C. 4., can be obtained by single stream gauges near the confluence of the Tongue and Powder Rivers and the Yellowstone. Net gains in reservoir storage can be obtained by water level measurements at the various reservoirs on two dates (October 1 and any given date). With its system of water rights filings, enforced by local hydrographers throughout the irrigation season, Wyoming can measure its actual post-1950 diversions on its side of the border. *See* WYO. STAT. ANN. §§ 41-3-602 through 606 (2007) (authority of hydrographers).

The Montana Legislature understood the need to develop its data collection for post-1950 rights covered by the Compact, because in 1953 it required all future diverters to install and use measuring devices and report the results to the Department of Natural Resources. MONT. CODE ANN. §§ 85-20-102 through 106 (2005). If Montana irrigators comply with the statute, Montana should be able to calculate the total divertible flow as of any given date, and should then be able to identify, and if necessary, allege a Wyoming violation. Tellingly, Montana has alleged no such violation, but instead offers incorrect Compact interpretations based on principles the drafters rejected.

After extensive negotiations, the Compact drafters incorporated the various tradeoffs that led to a rational, integrated, modified divertible flow compact. If this Court were to allow Montana to resurrect clauses from rejected drafts and insert concepts from other compacts between other states, such as the depletion principle, it would destroy the integrity and balance of the final Compact. Such an approach would violate the basic law of compacts that requires allegiance to the intent of the drafters. *See Oklahoma v. New Mexico*, 501 U.S. 221, 234-35 (1991). The Court should dismiss Montana's claims embodied in paragraphs 8 and 13 of its complaint.

C. Wyoming's Construction of Storage Reservoirs after January 1, 1950 Cannot Violate the Compact

Montana's first claim for relief targeting particular Wyoming water practices involves reservoir storage. Montana alleges that:

> Since January 1, 1950, Wyoming has allowed construction and use of new and expanded water storage facilities in the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact.

(Compl. ¶ 9).

This allegation does not state a claim as to either Wyoming's construction or use of reservoirs. The Compact does not restrict the construction of reservoirs, but instead, encourages it in both states. YRC

Preamble. In Article VII, the Compact even allows a downstream state like Montana to construct storage in an upstream state, and, of course, obtain the advantage of such an investment for its downstream users. YRC art. VII.

One reason Wyoming and Montana opted to simplify the Compact in the 1949/1950 round of negotiations was to speed completion of the Compact so storage could go forward, including potential federal projects that Montana wanted at the state lines on the Powder River (Moorhead Reservoir) and the Big Horn River (Yellowtail). App. 70, 73-74 (report of Congressman Engle, report of Secretary of Interior Chapman); App. 81, 85-86 (Commissioner Newell: "Installation of physical works needed to foster that use has been delayed pending an agreement between the States as to division of waters").

Since the Compact's adoption, Wyoming has added storage on tributaries to the Tongue and Powder, and Montana has significantly expanded Tongue River Reservoir, which was built in 1938 before the Compact. App. 95. The federal government also completed Yellowtail Dam on the Bighorn. Construction of reservoirs is not a Compact violation.

The storage of water in post-1950 reservoirs is covered by Section C of Article V. YRC art. V, § C. 2. On any given date, any net gain in storage after October 1 is counted for cumulative allocation if a question of Wyoming's compliance with its percentage allocation has arisen. The net gain in storage is not

counted alone, but as one component of the cumulative divertible flow sum. *See* App. 64 (allocation operated on an "annual basis with provision to check as required"). Reservoir storage could only cause Wyoming to violate the Compact if it caused Wyoming to exceed its *total* cumulative percentage allocation as of a given date. Montana has not alleged that this has ever occurred, or is likely to occur.

Perhaps Montana is approaching the reservoir issue from its faulty premise that the Compact calls for daily interstate prior appropriation. In 2004, Montana's Director of Water Resources, Jack Stults, complained to Wyoming that pre-1950 diverters in Montana lacked water, so post-1950 reservoirs in Wyoming should be drained of water stored earlier during peak runoff when there was no shortage in Montana. App. 93. For reasons discussed above, this argument has no merit. Post-1950 reservoir storage, like post-1950 direct diversions, is administered under the Compact cumulatively, by adding net gains in storage to the cumulative divertible flow, not by daily comparisons between individual diversions in Montana and Wyoming storage reservoirs.

Montana's reservoir theory would also violate a broader principle of western water law. Under both Wyoming and Montana law, when water users build reservoirs, and fill those reservoirs from a stream "in priority" (at a time that filling the reservoir does not interfere with diversions of natural flow to other more senior appropriators), the reservoir owners essentially become the owners of that stored water. *Fed.*

Land Bank v. Morris, 116 P.2d 1007, 1012 (Mont. 1941), *cited in Wheatland Irrigation Dist. v. Pioneer Canal Co.*, 464 P.2d 533, 540 (Wyo. 1970); *Kearney Lake Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, 475 P.2d 548, 551 (Wyo. 1970); WYO. STAT. ANN. § 41-3-303 (2007). The owners cannot be forced to deliver water they legally stored to other irrigators at a later date simply because those other irrigators are short of natural flow. *Fed. Land Bank*, 116 P.2d at 1011-12, *citing* SAMUEL WIEL, WIEL ON WATER RIGHTS § 279 (3d ed. 1911). After all, the reservoir owners stored the water when the other irrigators did not need it. *Id.* Without storage, the water would have flowed out of the basin, unused by the other irrigators. Therefore, the reservoir owners' later use of the water does not injure the other irrigators, and the stored water is not considered part of the natural flow. *Id.* If irrigators who did not invest in the storage could demand that water when they ran short, they would simply be taking advantage of those who invested in building the reservoirs to capture surplus flows. *Id.* at 1011. No junior appropriators would have incentive to build storage.

In summary, Wyoming water users properly constructed new storage after 1950, and Montana has not alleged any instance in which Wyoming has exceeded its percentage of cumulative divertible flow through a net gain in storage combined with total diversions. That is the only way in which Wyoming could violate the Compact through its use of storage.

Montana's reservoir allegations therefore fail to state a claim.

D. Wyoming's Irrigation of New Acreage Cannot Violate the Compact

Following its reservoir claim, Montana attacks Wyoming's development of new diversions after 1950. (Compl. ¶ 10). Montana alleges that Wyoming should not allow new acreage to be put under irrigation in the Tongue and Powder River Basins. *Id.* Yet the primary reason for the Compact was to encourage the compacting states to proceed with irrigation of new acreage by establishing a firm understanding of how divertible flow would be allocated to such new acreage. The drafters established this understanding through the modified divertible flow method. Thus, in order to successfully allege a Wyoming violation of the Compact because of Wyoming's future irrigation and other development, Montana must allege a violation of the allocation formula in a particular instance. Montana fails to do so in its complaint.

Instead, Montana only alleges that by "undertaking and allowing the aforementioned actions," to include expanded irrigation development, Wyoming "has depleted and is threatening to deplete" the Tongue and Powder Rivers. (Compl. ¶ 13). Thus, Montana's allegation about post-1950 water development in Wyoming is based on its depletion theory that is foreign to the Compact. This Court should dismiss this claim.

E. Wyoming Cannot Violate the Compact by Increasing Water Consumption on Acreage that had Irrigation Rights Before 1950

In addition to complaining about Wyoming's development of new irrigated acreage, Montana complains about the adoption of new irrigation technology by Wyoming irrigators with pre-1950 water rights. Montana alleges that "[s]ince January 1, 1950, Wyoming has allowed the *consumption* of water on *existing* irrigated acreage in the Tongue and Powder River Basins to be increased in violation of Montana's rights under Article V of the Compact." (Compl. ¶ 12) (emphasis added). This allegation is based primarily on the fact that some Wyoming irrigators, like some Montana irrigators, have changed from the flood irrigation to sprinkler irrigation systems. (Mont. Br. in Support of Motion for Leave to File Bill of Complaint 15) Since this claim also relies on the rejected depletion principle, it must be dismissed.

Wyoming does not dispute that sprinkler irrigation systems, invented in the 1940s, may be more efficient than flood irrigation systems, because the water is carried to the crops through pipes rather than leaky ditches, and is sprayed directly onto plants. Sprinkler systems can also reduce the need for "carriage water," extra water needed to make up for ditch seepage losses. On the other hand, sprinkler irrigation can cause irrigators to reduce their diversion of water from a stream because the water that gets to their crops is used more efficiently.

In any case, the Compact does not address delivery methods and does not restrict Wyoming's consumption of water in order to guarantee deliveries to Montana at the state line. Both states' irrigators with pre-1950 water rights are entitled to continue to enjoy those rights as they existed in each signatory state as of January 1, 1950. YRC art. V, § A. Wyoming irrigators with water rights as of January 1, 1950 would have obtained those rights either by the permitting process explained earlier in this brief, or by a stream-wide general adjudication earlier in the century, by which a Wyoming district court would have issued a decree confirming territorial water rights based on actual water use. *See* WYO. STAT. ANN. §§ 41-4-501 through 41-4-512 (permitting statutes) *and* WYO. STAT. ANN. §§ 41-4-301 through 41-4-317 (2007). In either case, the Wyoming water rights "existing" "as of January 1, 1950," are those which had been confirmed in writing filed at the State Engineer's Office.

As of 1950, Wyoming water rights identified, in writing, the acreages upon which the water could be applied, the point of diversion from the stream, and other particulars. WYO. STAT. ANN. §§ 41-4-501 and 41-4-502 (2007). Wyoming law, and permits or certificates of appropriation issued under that law, did not limit the technology by which irrigators could spread the water, or how much of the water would be consumed by their crops. If the irrigators could increase the efficiency of their water use so that more of the water went into the crop, or change their crop to one

that naturally consumed more water, that was their right, so long as the conditions on their certificates of appropriation remained the same. Wyoming law did not, and does not today, require irrigators to maintain any level of return flows to a stream. *Binning v. Miller*, 102 P.2d 54, 60-61 (Wyo. 1940); *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593, 601 (Wyo. 1957); *Fuss v. Franks*, 610 P.2d 17, 20 (Wyo. 1980). In *Bower*, the Wyoming Supreme Court wrote:

> No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator by a different method of irrigation can so utilize his water that it is all consumed in transpiration and consumptive use and no waste water returns by seepage or percolation to the river, no other appropriator can complain.

Bower, 307 P.2d at 601.

In Article V, the compact drafters did not state what methods irrigators in either state must use to apply diverted water onto their lands. They imposed no efficiency limit on irrigation, and stated no minimum flow that irrigators must return to a river from their land after using the water. As Montana's own Water Resources Division Administrator, Orrin Ferris, wrote about the Compact in 1976, "return flows are never mentioned." (App. A to Wyoming's

Brief in Opposition to Motion for Leave to File Bill of Complaint A-5).

Since the Compact excludes pre-1950 water rights from any percentage allocation, and allows irrigators in each state to simply abide by their own state's water laws, the Compact supports no claim that Wyoming irrigators cannot increase their consumption by changing crops or changing irrigation methods. If Montana wanted to impose consumption limits on pre-1950 Wyoming irrigators, it should have sought them in negotiations by supporting Mr. Myer's 1950 depletion draft. *See* App. 54-57 (Montana agreed with the choice of the divertible flow principle over the depletion principle).

Finally, if pre-1950 irrigators in either Montana or Wyoming can obtain new sources of water, most likely through new storage projects, to increase diversions onto existing irrigated acreage, or extend the irrigation season, the Compact provides that the supplemental supply is not counted under Section C against that state's cumulative allocation percentage. YRC art V, § B. Although such supplementation could increase the total consumption of water in that state, the increase would be expressly grandfathered under Section B.

In summary, Montana has failed to state a claim upon which relief can be granted based on increased consumption of water diverted to acreage that was under Wyoming water rights as of January 1, 1950. This is not a depletion Compact.

F. Montana Fails to State a Claim Regarding Wyoming's Groundwater Development

The Compact drafters made it clear in plain language throughout Article V that they intended the Compact to govern surface water, not groundwater. They also chose a modified divertible flow method, which unlike the depletion principle, regulates only surface water. Nevertheless, Montana alleges that Wyoming has violated Article V by "allowing the construction and use" of groundwater wells for irrigation and for production of coalbed natural gas in the Tongue and Powder Basins after 1950. (Compl. ¶ 11). This claim should be dismissed.

Section A of Article V states that the pre-1950 appropriative rights to the use of "the water of *the Yellowstone River System* . . . shall continue to be enjoyed[.]" YRC art. V, § A (emphasis added). The Compact defines the Yellowstone River System as "the Yellowstone River and all of its *tributaries, including springs and swamps*, from their sources to the mouth of the Yellowstone River[.]" YRC art. II, § D (emphasis added). The Compact defines the term tributary to mean "any *stream which in a natural state* contributes to the flow of the Yellowstone River, including interstate tributaries and tributaries thereof[.]" *Id.* § E (emphasis added). Finally, the Compact defines the "Interstate Tributaries" as the Clarks Fork of the Yellowstone River, Bighorn River, Tongue River, and Powder River. *Id.* § F.

These definitions simply do not encompass water produced artificially through the pumping of water from holes drilled in the ground, however deep. The 39 engineers, lawyers, farmers and ranchers on the Compact commission surely knew that a "stream" in its "natural state" or a "spring" or a "swamp," is not a groundwater well.[9] If they wanted Section A of Article V to cover groundwater, they simply could have said so.

The same analysis applies to Sections B and C of Article V. Section B begins by speaking of "waters of the Interstate tributaries of the Yellowstone River," which are defined as the four named "rivers." YRC art. II, § F. A river is "a natural stream of water larger than a creek and emptying into an ocean, a lake, or another river." NOAH WEBSTER, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1566 (Harold Whitehall ed. Cleveland World Publ'g Co. 1951). The second clause of Section B then allocates water for post-1950 rights by percentages among the four rivers. No groundwater is mentioned here.

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[9] A stream is "any current or flow of running water, especially one running along the surface of the earth; specifically, a small river." NOAH WEBSTER, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1800 (Harold Whitehall ed. Cleveland World Publ'g Co. 1951). A spring is "a flow of water from the ground, the source of a stream." *Id.* at 1760. A swamp is "spongy land; low ground filled with water; soft, wet ground; a marsh; a bog." *Id.* at 1840.

Section C of Article V, in defining the quantity of water subject to percentage allocation, refers to "*diversions*" above the points of measurement on the interstate tributaries, net changes in storage in "*reservoirs*," and the quantity of water that passes "the point of measurement in the *stream*." YRC art. V, § C (emphasis added). A reservoir is "a place where anything is collected and stored, generally a large quantity; especially, a natural or artificial lake or pond in which water is collected and stored for use, as to supply the needs of a community." NOAH WEBSTER, WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 1539 (Harold Whitehall ed. Cleveland World Publ'g Co. 1951). If the drafters intended the Compact to deal with underground storage in aquifers, they surely would have used terminology in addition to "reservoir." In the half century since the Compact was created, the compact commissioners have listed surface reservoir data in their annual reports, but no data for underground aquifers. *E.g.*, YELLOWSTONE RIVER COMPACT COMM'N, FIFTY-FIFTH ANNUAL REPORT, General Report 18-22 (2006).

The Compact defines "diversion" to mean "the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken." YRC art. II, § G. As noted above, tributary is defined by the compact as a "stream." *Id.* § E. Taking or removing water from a

tributary would mean pumping water from the stream's channel or turning it out through a headgate along the stream's bank. The exception embedded in the definition of diversion, which applies to water returned directly back into the stream's "*channel*," makes the definition even clearer. *Id.* § G. A diversion under the Compact does not include the pumping of water from a well drilled into an underground aquifer that might indirectly deplete a stream. Since Section C only seeks to allocate between the states quantities of water diverted, stored in reservoirs, or flowing out of a basin in a "stream," it only allocates surface water.

As explained throughout this brief, the compact drafters and Congress repeatedly described this Compact as a modified divertible "*flow*" compact. *E.g.*, App. 72 (Engle: "there is adopted a modified version of the divertible flow principle."); App. 84 (Newell: "the 'divertible flow' principle was chosen"). They thus intended their definitions to describe diversion of flows from surface waters – rivers, streams, tributaries, and interstate tributaries – not the gradual percolation of groundwater through aquifers.

In ¶ 11 of its complaint, Montana does not specify how Wyoming has violated the Compact by allowing groundwater pumping for irrigation and coalbed natural gas development in the Tongue and Powder River Basins. However, Montana has previously asserted that Wyoming groundwater development reduces water pressure in underground aquifers that contribute to springs that feed surface streams. On

page 14 of its Brief in Support of Motion for Leave to File Bill of Complaint, Montana stated: "All groundwater pumping has the potential to *deplete* the compacted waters of the Powder and Tongue Rivers." (emphasis added). Thus, Montana's groundwater allegation is based on its assertion that the Compact is a depletion compact. However, the passage of 57 years has not altered the plain fact that the drafters rejected the depletion principle in favor of modified divertible *flow*.

The Compact does not restrict Wyoming's depletions of the total annual water supply in a basin. If Montana wants to enter into a compact with Wyoming to administer groundwater, or to regulate the rivers and streams of the Yellowstone River Basin based on depletion or consumption concepts, it should invite Wyoming to the negotiating table, not ask this Court to rewrite the Compact. *See Arizona v. California*, 373 U.S. 546, 565 (1963) ("courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress"). Montana's groundwater claim must be dismissed.

CONCLUSION

Wyoming requests that the Court dismiss Montana's Bill of Complaint on grounds that it fails to state a claim upon which relief may be granted.

Respectfully submitted,

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April 2008

February 9, 1943

HON. LESTER C. HUNT, GOVERNOR
MEMBERS OF THE 27TH WYOMING
LEGISLATURE

Gentlemen:

As Interstate Streams Commissioner for Wyoming I deem it my duty at this time to outline for your information a brief summary of the history of the Yellowstone River Compact and some pertinent facts concerning which, it would seem, you should be advised.

The first Congressional authorization for a Yellowstone River Compact was in 1932 and included only the states of Montana and Wyoming. Clyde L. Seavey was appointed as the Federal Representative.

The first attempt at an allocation of any portion of the Yellowstone watershed was a so-called "Declaration of Plan of Allocating Water in the Big Horn basin", which was signed by members of the Big Horn Dam Association and by the Governors and State Engineers of Montana and Wyoming. It seems that this was not participated in or signed by a Federal representative, which may have been the reason it was never passed on by the Legislatures of the two states.

The next attempt at negotiations of which we have a record was February 6th, 1935, when a so-called Yellowstone River Compact, for allocation of the waters of the Yellowstone River between the

states of Montana and Wyoming was negotiated and signed at Cheyenne, Wyoming, by representatives of the two states and of the United States.

We have no record of this having been submitted to the State Legislatures for ratification.

The record shows no other representatives than the Governors and State Engineers at the 1933 meeting and only the State Engineers and the Federal representative at the second meeting. The only representative provided by law to represent the State prior to 1941 was the Interstate Streams Commissioner.

On August 2nd, 1937, the Congress again authorized the states of Montana and Wyoming to negotiate and enter into a compact for the equitable division of the waters of the Yellowstone River watershed and Clyde L. Seavey was appointed by the President to represent the United States and the Governors of each state appointed four representatives.

These commissioners met in Billings, Montana, May 5th, 1938, and again in Thermopolis, Wyoming, November 21st and 22nd, 1938. Each time negotiations were deferred pending the final report of the Bureau of Reclamation with reference to their basin-wide investigations including the water-shed of the Yellowstone River in Montana in Wyoming.

June 5th, 1940, Congress extended the time for negotiating the compact to June 1, 1943, and included North Dakota as a party to the negotiations.

October 10th, 1940, a meeting was held in Billings, Montana, where Wyoming was represented by Thornton, Metz and Bishop, and where it was agreed to postpone further negotiations until the basin-wide report of the Bureau of Reclamation was completed.

The 1941 Legislature amended the Interstate Streams Commissioner law to provide for appointment of assistant commissioners upon the recommendation of the Interstate Streams Commissioner. Upon my recommendation at that time, Governor Smith appointed L. F. Thornton, John Gonin, Ray Bower, Ernest Goppert, David Anderson, R. E. McNally and Will G. Metz. Later Ed. J. Johnson became a member of the Commission by virtue of his appointment on the Planning and Water Conservation Board, and just before November, 1942, meeting in Billings, Mr. Earl Bower was appointed as an assistant commissioner on my recommendation.

The first meeting where a tentative draft of the Yellowstone River Compact as prepared by Lesher S. Wing was considered, was held in the office of Mr. E. B. Debler, the Chief Hydraulic Engineer of the U. S. Bureau of Reclamation, in Denver, Colorado, from 7:30 to 9:30 p.m. on October 15th 1942. Mr. Fred E. Buck represented the State of Montana, Mr. John T. Tucker, the State of North Dakota, and Mr. L F. Thornton, Mr. Ed J. Johnson and Mr. L. C. Bishop, the State of Wyoming. Mr. Lesher S. Wing, Engineer of the Federal Power Commission, acted as a substitute for Mr. Clyde L. Seavey, Mr. W. G. Sloan, Engineer of the Bureau of Reclamation, acted in an

advisory capacity answering questions concerning the progress of the basin-wide investigations of his department. It was agreed that the entire day of October 17th was to be spent in further consideration of the tentative draft of the compact.

The meeting was held on October 17th and a preliminary draft was agreed upon with the understanding that Mr. Lesher S. Wing was to prepare it in proper form and furnish copies to the Commissioners of the three states.

The revised draft was submitted to the joint commission at a meeting held in Billings, Montana, on December 1st, 1942. (Our Wyoming Commissioners spent the entire day of November 30th in organizing and preparing for the negotiations that were to take place the following days.)

A public Hearing was held at the Chamber of Commerce Building in Billings the entire day of December 2nd with Mr. Clyde L. Seavey presiding. this meeting had been advertised in all the papers covering the Yellowstone River watershed area.

December 3rd, the Commissioners of the three states met at the Chamber of Commerce Building with Mr. Clyde L. Seavey presiding, and, while a general plan was finally agreed upon, the Commissioners were not satisfied to sign a compact without further hearings in the basin and further consideration of the provisions. The meeting was adjourned at 11:50 p.m. to re-convene at the call of the chairman.

At the call of the chairman, the Commission again met at Billings, Montana, on December 29th, 1942, with Mr. Beebe presiding, and continued during December 30th and, at 1:15 a.m. December 31st, a unanimous agreement of the Commissioners was reached and all agreed to sign except Mr. R. E. McNally who was obliged to leave early in the evening of the 30th, and who later decided not to sign. Will G. Metz was not present at the meetings but signed the Compact as drafted and agreed upon.

The entire day of December 31st was spent by the engineers and some of the others in checking computations made by Mr. Wing and the wording of the draft as approved by the Commissioners.

This compact, as presented to the Legislature for ratification, represents conclusions which, in some instances, were compromises arrived at and unanimously agreed upon by the entire group of State representatives and the representative of the United States, assisted by engineers and attorneys of the Federal Power Commission, U. S. Bureau of Reclamation, Army Engineers and the U. S. Indian Service.

Mr. John A. Whiting, former State Engineer of Wyoming, Mr. Howard Bell, Civil Engineer of Cody, and Mr. Elmer K. Nelson, Civil Engineer of Laramie, were employed as engineer advisors for the Wyoming delegation with Mr. L. J. O'Marr, Wyoming Attorney General, and Mr. W. J. Wehrli, attorney from Casper, acting as legal advisors.

Also, on our commission, we had Mr. Ernest Goppert and Mr. R. E. McNally, attorneys, who rendered very able assistance, and contrary to the opinion expressed by some, the representatives of Federal Agencies have assisted by every means at their disposal to aid us in solving this problem.

Since the printed copies have been distributed, several protests have been registered, but, in my opinion, none have merits that will offset the benefits that will accrue to all concerned by approval of the Compact at this time. It is my opinion that without exception, the allotments are just and equitable and that the draft as a whole is a favorable to Wyoming as we could expect by any compact later entered into, and for reason stated herein, I recommend the passage of House Bill No. 99 entitled "A Bill for AN ACT to provide for the ratification and approval of the Yellowstone River Compact."

Respectfully submitted,

/s/ L. C. Bishop
L.C. BISHOP, State Engineer
and Interstate Streams
Commissioner For Wyoming.

YELLOWSTONE RIVER COMPACT
BETWEEN
THE STATES OF WYOMING AND MONTANA

* * *

ARTICLE V

(a) The waters of the Yellowstone River and tributaries are public waters and as such are the properties of the states within which they originate and flow, but the use of such waters is subject to appropriation for beneficial use under the laws of the separate states and under general water-right law as interpreted by the Courts.

(b) Priority of appropriation for beneficial uses shall give the better right. The right of a prior appropriator is such that he is entitled to have the stream flow, within the amount of his right, and within the needs of the beneficial use for which appropriation was made, as it did when he appropriated, undiminished by the use of any later appropriator or by any increased use of earlier priority. Beneficial use is the basis, the measure and the limit of any right to the use of public water.

(c) Wherever and whenever practical the waters of all interstate streams shall be divided at the state line, having due regard to elements of return flow, priority, and established uses. . . .

* * *

ARTICLE VI

* * *

(b) The Commission shall at once begin the study of the various interstate streams and shall determine the amount of water to be divided between the states at the state line. The conclusions reached are to be based on the law of priority, the law of beneficial use, due regard to stream increases caused by underground storage and return flow and any other salient facts, that in the opinion of the Commission, may have a bearing upon the equitable distribution of water, within the intents and purposes of this compact.

* * *

Executed in three original copies at Cheyenne, in the State of Wyoming, this Sixth day of February, A. D. 1935.

* * *

PROGRESS REPORT TO THE GOVERNORS OF THE STATES OF MONTANA AND WYOMING AND TO THE CONGRESS OF THE UNITED STATES REGARDING YELLOWSTONE BASIN COMPACT

* * *

The above-representatives of Federal and State interests comprise the Yellowstone River Compact Commission.

Following the appointment of these representatives, meetings were held on May 5, 1938, in Billings, Montana and on November 21, and 22, 1938, in Thermopolis, Wyoming. In addition to members of the Commission, there were also present at these meetings representatives of federal bureaus . . . The purpose of these meetings was to ascertain the character of information required for the drafting of the Yellowstone River Basin Compact, and the extent to which data on climate, topography, land ownership, population, and water development are available; to investigate the uses of water for irrigation, power, navigation, domestic and industrial purposes, and to study the laws of the States of Montana and Wyoming with respect thereto. . . .

From an analysis of the available information, it is the concensus of the Compact Commission:

1. That adequate factual data necessary to the drafting of a compact between the States of Montana and Wyoming are not available at

the present time; however, studies now being carried on by the Bureau of Reclamation, U. S. Army Engineers, Forest Service, Indian Service, and other Federal agencies will produce a considerable amount of additional data, which will be useful for this purpose. Information which is presently inadequate or entirely lacking is as follows:

(a) Existing diversions for irrigation;

(b) Priorities of irrigation appropriations and rights;

(c) Acreages presently being irrigated and which are irrigable from existing works;

(d) Net water duty on irrigated lands;

(e) Crops grown on irrigated lands;

(f) Potentially irrigable lands and their water requirements;

(g) Stream flow data on minor tributaries;

(h) Location and cost of additional storage;

(i) Soil surveys;

(j) Studies of soil erosion, and silting of reservoirs;

2. That apparently the annual run-off of the Yellowstone River basis is sufficient to meet all existing and potential consumptive uses if and when a comprehensive plan of storage has been developed and put into effect;

* * *

4. That approximately 740 square miles of the drainage basin of the Yellowstone River lies within the State of North Dakota; therefore it appears desirable that the Congress of the United States amend its authorization for a compact with reference to the waters of the Yellowstone River to include the State of North Dakota as a signatory thereto;

5. That, because existing water supplies as presently developed are inadequate to fully meet demands for irrigation and other uses in critically dry years, there is imminent danger that irrigators in certain areas will resort to costly and protracted litigation in order to protect their rights; therefore, it is essential that additional storage be constructed at strategic points at the earliest possible date in order to relieve this situation; . . .

* * *

Dated Feb. 25, 1939

PRELIMINARY REPORT
ON
YELLOWSTONE RIVER BASIN

COMPILATION OF FACTUAL DATA
FOR USE OF
THE YELLOWSTONE RIVER
COMPACT COMMISSION

FEDERAL POWER COMMISSION
BUREAU OF ENGINEERING
DENVER REGIONAL OFFICE

DECEMBER 1940

* * *

. . . According to the 1939 survey, a total of 57,605 acres are under canals, of which 53,305 acres are being irrigated at present. Of the area under canals, about 75 percent is in Wyoming and 25 percent in Montana.

It will be noted from table 43 that all of the existing projects in Montana take their water supply directly from the main stem of the Tongue River. This table also indicates that the 13,840 acres being irrigated in Montana suffered an average annual shortage of 10,450 acre-feet during the period 1930-1938. According to the field survey sheets from which the table was prepared, shortages occurred during July, August, and September of every year, and were particularly severe in 1934. From table 44, it is evidence that there is frequently less than fifty second-feet in the river at the state line. From July 18 to

September 3, 1934, there was never more than ten second-feet in the river at this point. The combined capacity of the diversion canals in Montana is about 300 cubic feet per second, and the gage at Miles City shows that the canals divert the entire stream during most of the irrigation season.

* * *

It is evident from the stream flow records that additional irrigation in this basin must depend upon new storage capacity. . . .

* * *

As shown in table 17, there are four existing reservoirs in the basin having a combined capacity of 73,020. Big Horn, Dome Lake, and Park reservoirs are all in Wyoming and have a total capacity of 13,020 acre-feet. The Tongue River Reservoir, which is in Montana, has a capacity of 60,000 acre-feet.

Table 1 of Appendix II lists eight potential reservoirs in Wyoming having an aggregate capacity of 103,446 acre-feet. Pumpkin Creek Reservoir, with a capacity of 6,800 acre-feet, is listed in table 3 of Appendix II. Two additional reservoirs on Pumpkin Creek are listed in table 2 of Appendix II. . . .

* * *

Irrigation along the lower reaches is at present almost negligible, as is indicated by the fact that less than 400 acres in Montana are irrigated from the Powder River.

* * *

It will be noted from this record that the flow at the state line is extremely low during the late irrigation season. . . .

* * *

Practically all the irrigated land in the Powder River Basin is in Wyoming. . . . According to the 1939 survey, a total of 75,480 acres are under canals, of which 63,785 acres are being irrigated at present. . . .

Only 380 acres in the Powder River Basin in Montana are irrigated at present. This area is in small tracts along the river, in Custer and Prairie Counties, and is irrigated from the main stem by pumping. . . .

* * *

The ultimate irrigable area of the basin as estimated by the Corps of Engineers is 122,705 acres. . . .

The Wyoming Report estimated the ultimate irrigable area in Wyoming at 216,500 acres (see table 18 and Appendix I, table 2). The Montana Reports do not give an estimate of the ultimate irrigable area in Montana, but indicate that the Army figure should be increased by 14,600 acres. . . .

* * *

The existing reservoirs in the basin have a total capacity of 35,013 acre-feet. The major reservoirs, all of which are in Wyoming, are listed in table 17. . . .

More than 30 sites for potential reservoirs have been investigated in the Powder River Basin. The combined capacity of the 34 potential reservoirs listed for Wyoming in table 1 of Appendix II is 255,270 acre-feet. The capacity of the potential Moorhead Reservoir in Montana is 46,000, which makes a total of 301,270 acre-feet for the entire basin. . . .

* * *

YELLOWSTONE RIVER COMPACT

The State of Montana, the State of North Dakota, and the State of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, have resolved to conclude a Compact as authorized under the Act of the Congress of the United States of America, approved June 15, 1940 (Public No. 632, 76th Congress, Third Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective Commissioners:

For the State of Montana:	For the State of North Dakota:
Fred E. Buck	John T. Tucker
W. E. Ogden	Kenneth W. Simons
P. F. Leonard	Einar Dahl
H. W. Bunston	M. M. Millhouse
Wesley A. D'Ewart	Frank P. Whitney

For the State of Wyoming:

L. C. Bishop	Ernest Goppert
L. F. Thornton	David Anderson
John Gonin	~~R. E. McNally~~
Earl Bower	Will G. Metz
Ray Bower	Ed J. Johnson

* * *

I. The term "Divertible Flow" means the quantity of water that could be diverted from the stream flow above a designated point of measurement during a specified period of time. It is comprised of three elements: (a) the total net inflow to storage; (b) the total diversions; and (c) the remaining flow in the stream at the designated point of measurement for which the divertible flow is being determined. It is computed as follows:

The algebraic sum of:

(a) The quantity of water (in acre-feet) that flowed into reservoirs situated above the point of measurement during the specified period of time; less the outflow and diversions made directly from reservoirs (in acre-feet) during the same period; plus

(b) The quantity of water (in acre-feet) that was diverted from the stream above the point of measurement (including diversions made directly from reservoirs) during the specified period of time; plus

(c) The quantity of water in the stream (in acre-feet) that flowed past the point of measurement for which divertible flows are being determined during the specified period of time.

J. The term "Mean Divertible Daily Flow" means the average divertible flow occurring during a twenty-four hour period, beginning at 12:00 midnight.

* * *

3. Tongue River

Each day during the period May 1st to September 30th, inclusive, of each year, the first 2,200 acre-feet of mean divertible daily flow of the Tongue River, determined at the lowest point of diversion on this stream, shall be divided seventy-two (72) per cent to Wyoming and twenty-eight (28) per cent to Montana; and the next 1,200 acre-feet of mean divertible daily flow shall be divided forty-three (43) per cent to Wyoming, and fifty-seven (57) per cent to Montana; however, either State may temporarily divert, consume, or store for its beneficial use any unused part of the above flows allotted to the other, but no continuing right to such unused flows shall be established thereby. Unappropriated divertible daily flows in excess of 3,400 acre-feet occurring during the period May 1st to September 30th, inclusive, and all presently unappropriated flows occurring during the period October 1st to April 30th, inclusive, of each year, shall be subject to future appropriation by Montana, North Dakota, and Wyoming for beneficial use within the Yellowstone River Basin.

4. Powder River (Exclusive of Little Powder River)

Each day during the period May 1st to September 30th, inclusive, of each year, the first 2,000 acre-feet of mean divertible daily flow of the Powder River, determined at the Wyoming-Montana State line, shall be divided ninety-six and one-half (96½) per cent to Wyoming and three and one-half (3½) per cent

to Montana; and the next 2,600 acre-feet of mean divertible daily flow shall be divided sixty (60) per cent to Wyoming, and forty (40) per cent to Montana; however, either State may temporarily divert, consume, or store for beneficial use any unused part of the above flows allotted to the other, but no continuing right to such unused flows shall be established thereby. Unappropriated divertible daily flows in excess of 4,600 acre-feet occurring during the period May 1st to September 30th, inclusive, and all presently unappropriated flows occurring during the period October 1st to April 30th, inclusive, of each year, shall be subject to future appropriation by Montana, North Dakota, and Wyoming for beneficial use within the Yellowstone River Basin.

* * *

Done at the City of Billings in the State of Montana, this 31st day of December, in the year of Our Lord, One Thousand Nine Hundred and Forty-two.

* * *

PROPOSED YELLOWSTONE RIVER COMPACT

EXPLANATION OF ARTICLE V

Montana State Engineer's Office, Jan. 30, 1943

It is the intention herein to briefly explain the contents of Article V in as simple language as possible.

* * *

Mean Divertible Daily Flow:

If it was physically possible to measure items (a), (b), and (c) within any one 24-hour period, there would be no reason for injecting this term into the Compact. It may take a week or ten days to make all these measurements, (due to the long distances, poor roads, etc). When all the measurements are made and added up, the sum is then divided by the number of days it took to make the measurements, and the result is the "mean divertible daily flow". (Art. II, Sec. J).

* * *

P. F. LEONARD
Attorney at Law

MILES CITY, MONTANA

June 29, 1944

Mr. H. D. Comstock
Regional Director
Bureau of Reclamation
Billings, Montana

Dear Mr. Comstock:

* * *

I do not believe that Powder River need go in the compact as there is very little irrigation on Powder River in Montana and the proposed Moorhead dam should take care of the potential irrigation.

* * *

Sincerely yours,

P. F. LEONARD

YELLOWSTONE RIVER COMPACT

The State of Montana, the State of North Dakota, and the State of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, have resolved to conclude a Compact as authorized under the Act of the Congress of the United States of America, approved March 16, 1944 (Public No. 257, 78th Congress, Second Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective Commissioners:

For the State of Montana:

Fred E. Buck	E. E. Tiffany
W. E. Ogden	D. M. Manning
P. F. Leonard	Chester E. Onstad
H. W. Bunston	Paul J. Hagan
Wesley A. D'Ewart	Axel Persson

For the State of North Dakota:

J. J. Walsh	M. M. Millhouse
Kenneth W. Simons	Frank P. Whitney
Einar H. Dahl	John T. Tucker

For the State of Wyoming:

L. F. Thornton	David G. Anderson
John Gonin	W. B. Snyder
Earl Bower	Mark N. Partridge
Ray Bower	L. C. Bishop
R. E. McNally	H. J. Paustian
E. J. Johnson	W. R. Holt
Ernest J. Goppert	

* * *

3. Tongue River

Each day during the period May 1st to September 30th, inclusive, of each year, the first 2,200 acre-feet of mean divertible daily flow of the Tongue River, determined at the lowest point of diversion on this stream, shall be divided seventy-two (72) per cent to Wyoming and twenty-eight (28) per cent to Montana, and the next 1,200 acre-feet of mean divertible daily flow shall be divided forty-three (43) per cent to Wyoming and fifty-seven (57) per cent to Montana: Provided, That either State may temporarily divert, consume, or store for its beneficial use any unused part of the above flows allotted to the other, but no continuing right to such unused flows shall be established thereby. Unappropriated divertible daily flows in excess of 3,400 acre-feet occurring during the period May 1st to September 30th, inclusive, and all presently unappropriated flows occurring during the period October 1st to April 30th, inclusive, of each year, shall be subject to future appropriation for beneficial use within the Yellowstone River Basin in

Wyoming, Montana, and North Dakota in accordance with the laws of said respective States.

The provisions herein, and each of them, and in particular the allotments, and each of them, shall be subject to the following conditions:

* * *

(b) Such provisions and allotments shall become operative either ten (10) years from and after the date that this Compact is ratified by the Congress; or on June 15 of the year in which water is available for release through any adequate distributary system, other than the stream bed, from the Tongue Rive Reservoir of the Montana Water Conservation Board for beneficial uses in Montana, the amount of water so released, however, shall be equal to at least one-half of the working capacity of such reservoir; or on June 15 of the year in which water is available for release through any adequate distributary system, other than the stream bed, if such be necessary, from any storage reservoir constructed in Wyoming to conserve for beneficial uses in Wyoming the waters of the Tongue River, the amount of water released, however, shall be equal to at least one-half of the working capacity of such reservoir; or whichever of said dates is the earlier.

Done at the City of Billings in the State of Montana, this 18th day of December, in the year of Our Lord, One Thousand Nine Hundred and Forty-four.

* * *

January 7, 1949

* * *

Dear Mr. Bishop:

* * *

In the Platte River Case, the Supreme Court did not disturb any existing water appropriations in Wyoming in the upper River Basin. All appropriations were recognized. These appropriations, all of them, amounted to 168,000 acres. The contention of Nebraska was that junior appropriators in Wyoming should have their headgates closed to supply water to senior appropriators in Nebraska. This contention by Nebraska was denied. Junior appropriators in Wyoming can freely use the waters of the Platte River without regard to senior appropriations in Nebraska. Said the Court in answer to this contention by Nebraska, "but as the Special Master points out, those Wyoming appropriations, though junior, represent old, established uses in existence from forth to over fifty years".

Many of our appropriations have been in existence for 69 years. You would reduce and impair those appropriations. This Compact does just that. But if the matter were submitted to the Supreme Court, these ancient rights would be protected as they were in the Platte River Case.

We should have no fear of litigation. The Courts would give us more, by far, than we are getting under this Compact. You have good irrigation lawyers

available to you. Why don't you consult them, and take their advice?

* * *

Very sincerely yours,

/s/ R.E. McNally
R. E. McNally

Discussion of the Yellowstone River Compact and Its Effect Upon the Water Users of the Upper Tongue River Basin in Wyoming

By E. C. GWILLIM
Irrigation Engineer

January 22, 1949

SHERIDAN, WYOMING

* * *

HISTORY:

A Yellowstone River Compact has been under discussion and consideration since the first Congressional authorization in 1932. The first discussions were between Montana and Wyoming. The first tentative draft was prepared in Denver, Colorado in October 1942. A revised draft was presented at Billings, Montana, on December 22, 1942 to the joint compact commission, which consisted of representatives of Montana, North Dakota, and Wyoming. The compact with additional revisions was approved and agreed to by all except one of the representatives of the three states. The final draft of the compact was prepared by representatives of federal agencies, namely; the United States Bureau of Reclamation and the United States Federal Power Commission. "A

Bill for An Act to provide for the ratification and approval of the Yellowstone River Compact" was presented to the 1943 Wyoming Legislature. The compact was amended to exclude Tongue and Powder Rivers and was so passed by the Wyoming Legislature. The states of Montana and North Dakota would not accept the compact as amended. The original compact was presented to the 1945 Wyoming Legislature and was approved by that body, but was vetoed by the Governor. Many interested persons and some compact commissioners favor having a bill introduced in the 1949 legislature for ratification. The legislatures of Montana and North Dakota have ratified the compact as approved at Billings, Montana on December 22, 1942.

* * *

The workability of the formula for determining the divertible flow is questionable. With few exceptions most of Wyoming diversions are for individual farms. To determine the divertible flow requires installing measuring devices on all ditches. In Tongue River Basin Wyoming there are over 400 diversions. To determine the daily divertible flow, a measurement must be taken every day during the period of May 1st to September 30th on each diversion. These measurements will be in cubic feet per second – the basis of measurement of irrigation water in Wyoming. Such measurements must be converted to acre feet. After the total divertible flow is determined then headgates must be adjusted to comply with the excess or deficit. Perhaps the stream flow has now varied

and new measurements must be again taken. The same situation exists in Montana. The miles to be covered in making such measurements daily will require the service of many people, many vehicles, and equipment. Installation of measuring boxes will be at the expense of each individual ditch owner and must be maintained by him. On the Big Horn River, of the 134,800 acres irrigated from Big Horn River 85 per cent of the water is diverted through 28 ditches, and of this amount 75% is diverted through seven ditches. The measurement of the water diverted in Big Horn Basin is relatively easy. The division of water on the daily divertible flow basis as determined by the formula has not been used in any other compact that has been drawn up in other states.*

* * *

United States
Department Of The Interior
Bureau Of Land Management
Region III
Missouri River Basin Investigations

LAND PLANNING AND CLASSIFICATION REPORT

as Relates to the Public Domain Lands
in the

POWDER RIVER BASIN
(Montana and Wyoming)

(For Administrative Use Only)

March 1949

* * *

The potential opportunities for ground water recovery within the basin very considerably because of the dissimilarity of geologic materials and structural conditions. The quality of ground water is good in most cases and becomes better as the mountainous west boundary is approached. No areas are known to exist where underground water occurs in sufficient quantity for irrigation to encourage additional well developments. However, according to reports of the U.S. Geological Survey, artesian flows occur irregularly along the Powder River. Thousands of small

stock-watering-reservoirs have been constructed primarily due to the lack of subsurface water supplies. In many of the lower elevation range areas, the reservoirs are the only source of water for livestock.

* * *

For Immediate Release OCTOBER 26, 1949.

R. J. NEWELL NAMED U. S. COMMISSIONER ON YELLOWSTONE BASIN COMPACT

R. J. Newell, who recently retired as regional director of the Bureau of Reclamation at Boise, Idaho, has been named by President Truman to be United States commissioner for the formulation of an interstate compact providing for an equitable division and apportionment of the waters of the Yellowstone River and its tributaries among the States of Wyoming, Montana, and North Dakota.

* * *

YELLOWSTONE RIVER COMPACT COMMISSION

Minutes of Meeting
Nov. 29, 1949

The first meeting of the Yellowstone River Compact Commission was held at the Northern Hotel in Billings, Montana, on November 29, 1949, and was called to order at 10:00 a.m. by Mr. R. J. Newell, Federal representative on the Commission.

* * *

Mr. Lloyd urged that an Engineering Committee be set up to assemble basic data.

Mr. McNalley moved that the Chair appoint an Engineering Advisory Committee consisting of three representatives from Montana, three from Wyoming, and representatives of Governmental agencies to investigate, gather data and assist the Compact Commission. The motion was seconded.

It was recommended that the Bureau of Reclamation, Geological Survey and Federal Power Commission have representatives on the Committee.

It was suggested that North Dakota should be represented and the maker of the motion stated that the omission was an oversight. Mr. Acker asked that the State Engineer of North Dakota be the only Committee member from that state. It was suggested that the State Engineers of the three states be designated on the Committee with power to call on others for assistance. Mr. Lloyd stated that the State Engineer of Wyoming, as ex-officio Interstate Streams

Commissioner, would probably prefer not to serve on the Engineering Committee. Mr. Buck suggested that three representatives from each state should not be necessary, that one would be sufficient.

* * *

It was moved to amend the motion by reducing the representation to one from each state and one from the Bureau of Reclamation.

Motion was seconded and unanimously carried.

* * *

The Chair appointed the State Engineers of the three states, Mr. Fred Buck from Montana, Mr. J. J. Walsh from North Dakota, and Mr. L. C. Bishop from Wyoming, together with Mr. Carl L. Myers as the Bureau of Reclamation representative.

The Chair asked if written instructions would be required for the guidance of the Committee.

Mr. Manning suggested four items to be required, and as discussion continued the list was expanded to the following:

1. A flow table on the main stem and tributaries.

2. Acreage irrigated.

3. Potential irrigable acreage together with the source of records and estimate.

4. Record of priorities in the three states.

5. Consumptive use of water including industrial use.

6. Climatological data.

7. Storage available.

8. Potential Storage.

* * *

Mr. Pratt moved that the Engineering Committee heretofore selected be instructed by the Commission to prepare as soon as possible, but not later than January 15, 1950, a tabulation of existing information included within the eight items previously discussed, and a tabulation of further items which the Committee feels are required to enable the Commission to arrive at a solution.

The motion was seconded.

* * *

The motion was carried immediately.

* * *

YELLOWSTONE RIVER COMPACT COMMISSION

Minutes of Meeting
Feb. 1-2, 1950

The second meeting of the Yellowstone River Compact Commission was held at the Northern Hotel in Billings, Montana, on February 1 and 2, 1950, and was called to order at 10:10 a.m. by Mr. R. J. Nowell, Chairman. . . .

* * *

The Chairman called on Mr. C. L. Myers, Chairman of the Engineering Committee, who reported on the two meetings which the Committee had held and presented the report of the Committee, which had previously been distributed to all Commissioners. There was discussion as to the proper disposition of the report. A motion to approve was modified by the maker and as finally stated read "that the report be accepted as a basis for negotiation and that sincere thanks be extended to the Committee for its work." The motion was seconded and carried.

* * *

Mr. Thornton suggested discussion of Compact policy, forgetting the prior drafts, and the discussion proceeded along these lines, including the questions of whether inter-state priorities would be considered, whether storage would enter into the negotiations, and the general proposition that water would be divided on the basis of acres irrigated and potentially irrigable.

* * *

Mr. Person suggested two principles to be followed:

(1) Existing rights shall be recognized and remain unimpaired.

(2) The unappropriated unused water shall be divided on the basis of potential development. Mr. Leonard asked whether interstate priorities should be considered. Mr. Person replied that they should not.

* * *

Mr. McNally, speaking for the Wyoming members of the Tongue River Committee, stated that the Committee had not been able to agree on the question of existing rights. He stated that the Wyoming Commissioners wanted all such rights recognized in both states, but that the Montana Commissioners were not willing to let these rights remain unimpaired.

Mr. Leonard, speaking for the Montana Commissioners, stated that it was the sense of his group that no Compact could be agreed upon unless the division of the Tongue River water was on an equitable basis, and that the proposal suggested by Wyoming was not considered to be on such a basis. Montana proposed as one possible basis for the Compact, consideration of the rights on the stream in terms of priority without respect to State line.

The Chairman suggested referring the question back to the Committee with instructions to attempt further to reach an agreement.

* * *

Mr. Leonard requested that Mr. Burke, Regional Counsel of the Bureau of Reclamation, and the Engineering Committee submit to the Drafting Committee a suggested form of Compact. He discussed the procedure of drafting previous Compacts and asked whether Mr. Burke would be willing to prepare the first draft. Mr. McNally and Mr. Acker concurred in the request. Mr. Pratt agreed to phone Mr. Burke and inquire whether he would accept this assignment. Following the phone call, Mr. Pratt reported that Mr. Burke would accept the assignment, but wanted specific instructions as to whether he should fit the agreed upon provisions into the 1944 draft or should begin with a completely new draft. Mr. Acker moved that the draft prepared by Mr. Burke should be a completely new start, built from the ground up. The motion was seconded and unanimously carried.

* * *

YELLOWSTONE RIVER COMPACT

Tentative Agreements Reached February 2, 1950

at Billings, Montana.

* * *

TONGUE RIVER

1. Appropriative rights to the beneficial uses of the water of the Tongue River system existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

2. Wyoming and Montana agrees that the unappropriated waters of the Tongue River system subsequent to January 1, 1950, shall be allocated to each state as follows:

60% to Montana
40% to Wyoming

* * *

(Draft, 4/14/50)

YELLOWSTONE RIVER COMPACT

* * *

H. The terms "Divert" and "Diversion" mean the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken.

I. The term "Divertible Flow" means the quantity of water that could be diverted from the stream flow above a designated point of measurement during a specified period of time. It is comprised of three elements: (a) the total net inflow to storage; (b) the total diversions; and (c) the remaining flow in the stream at the designated point of measurement for which the divertible flow is being determined. It is computed as follows:

The algebraic sum of:

(a) The quantity of water (in acre-feet) that flowed into reservoirs situated above the point of measurement during the specified period of time; less the outflow and diversions made directly from reservoirs (in acre-feet) during the same period; plus

(b) The quantity of water (in acre-feet) that was diverted from the stream above the point of measurement (including

diversions made directly from reservoirs) during the specified period of time; plus

(c) The quantity of water in the stream (in acre-feet) that flowed past the point of measurement for which divertible flows are being determined during the specified period of time.

J. The term "Mean Divertible Daily Flow" means the average divertible flow occurring during a twenty-four hour period, beginning at 12:00 midnight.

* * *

ARTICLE V

A. The States of Montana, North Dakota, and Wyoming hereby agree that the waters of the Yellowstone River and its interstate tributaries shall be apportioned among said States as follows:

1. Clarks Fork, Yellowstone River.

All existing rights to the beneficial use of the waters of the Clarks Fork Basin in the States of Montana and Wyoming valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact.

The total unused or unappropriated divertible flow of the Clarks Fork River Basis is divided:

40% to Montana

60% to Wyoming

2. Big Horn River (Exclusive of Little Horn River).

Subject to existing Indian Treaty Rights, all existing rights to the beneficial use of the waters of the Big Horn River Basin in the States of Montana and Wyoming, valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact: *Provided*, That at times when insufficient water is available to supply all existing rights in both States the water that is available will be apportioned to rights in the two States on the basis of priority of rights in the two States.

The total unused or unapportioned divertible flow of the Big Horn River Basin is divided:

__% to Montana

__% to Wyoming

(The percentages are to be based on potential irrigable areas in the two States as determined by the Engineering Committee and approved by the Compact Commissioners.)

3. Tongue River

Appropriative rights to the beneficial uses of the water of the Tongue River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Wyoming and Montana agree that the unappropriated waters of the Tongue River System subsequent to January 1, 1950, shall be allocated to each States as follows:

60% to Montana

40% to Wyoming

4. Powder River (Exclusive of Little Powder River).

All existing rights to the beneficial use of the waters of the Powder River in the States of Montana and Wyoming valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact.

The total unused or unappropriated divertible flow of the Powder River Basis is divided:

58% to Montana

42% to Wyoming

YELLOWSTONE RIVER COMPACT COMMISSION

Memorandum Notes of Meeting of Drafting
and Engineering Committees
Billings, Montana
August 22 and 23, 1950

A joint meeting of the representatives of the Drafting and Engineering Committees of the Yellowstone River Compact Commission was called to order by O. C. Reedy, Secretary, at 10:30 a.m. on August 22, 1950. . . .

* * *

It was then recommended by Mr. Leonard that the compact written by Mr. Burke be reviewed and objections voiced. The changes proposed by Mr. Leonard were discussed, together with those of Mr. McNally for Wyoming. Drafts of these changes were circulated.

* * *

Mr. Acker made the suggestion that Mr. Leonard write a compact for Montana and Mr. McNally write one for Wyoming, in order to find out definitely what each State expects. When the Commission meets again, they can be read together to eliminate parts disagreeing and combine parts agreeing.

* * *

Mr. Myers stated that the only problem he could see to solve was how to provide for new storage, and that the simplest kind of compact was most practical and easy to administer. One of the ways to make it

simple is to put a ceiling on the depletion to take place upstream, using whatever standards we need.

* * *

YELLOWSTONE RIVER COMPACT

* * *

ARTICLE V

A. Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

B. The unused and unappropriated waters of the interstate tributaries of the Yellowstone River, exclusive of uses coming within the provisions of paragraph E of this Article V, are hereby allocated to each State for storage or direct diversion as follows:

1. *Clarks Fork, Yellowstone River*

   a. To Wyoming 60%

      To Montana 40%

   b. The point of measurement shall be below the last diversion from Clarks Fork above Rock Creek.

* * *

3. *Tongue River*

   a. To Wyoming 40%

      To Montana 60%

   b. The point of measurement shall be below the last diversion from the Tongue River

above its junction with the Yellowstone River.

* * *

2. *Big Horn River (Exclusive of Little Big Horn River)*

   a. To Wyoming 80%

      To Montana 20%

   b. The point of measurement shall be below the last diversion from the Big Horn River above its injunction with the Yellowstone River, and the inflow of the Little Big Horn River shall be excluded from the quantity of water subject to allocation.

* * *

4. *Powder River (including the Little Powder River)*

   a. To Wyoming 42%

      To Montana 58%

   b. The point of measurement shall be below the last diversion from the Powder River above its junction with the Yellowstone River.

C. The quantity of water subject to the above percentage allocations shall be determined on an annual water year basis measured from October 1st of any year through September 30th of the succeeding year. The quantity to which the percentage factors

shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:

1. The total diversions, in acre-fee, above the point of measurement, for irrigation, municipal, and industrial uses in Wyoming and Montana developed after January 1, 1950, during the period from October 1st to that given date;

2. The net change in storage, in acre-feet, in all reservoirs in Wyoming and Montana above the point of measurement completed subsequent to January 1, 1950, during the period from October 1st to that given date;

3. The net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950, during the period October 1st to that given date;

4. The quantity of water, in acre-feet, that passed the point of measurement in the stream during the period from October 1st to that given date.

E. There are hereby excluded from the provisions of this Compact:

* * *

2. Supplemental water for use on lands under existing developments.

* * *

ARTICLE VII

A. A lower signatory State shall have the right, by compliance with the laws of an upper signatory State, except as to legislative consent, to file application for and receive permits to appropriate and use any waters in the Yellowstone River System not specifically apportioned to or appropriated by such upper State as provided in Article V; and to construct or participate in the construction and use of any dam, storage reservoir, or diversion works in such upper State for the purpose of conserving and regulating water that may be apportioned to or appropriated by the lower State: *Provided*, That such right is subject to the rights of the upper State to control, regulate, and use the water apportioned to and appropriated by it: *And provided further*, That should an upper State elect, it may share in the use of any such facilities constructed by a lower State to the extent of its reasonable needs upon assuming or guaranteeing payment of its proportionate share of the cost of the construction, operation, and maintenance. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

* * *

UNITED STATES
DEPARTMENT OF THE INTERIOR

BUREAU OF RECLAMATION

Yellowstone District
P.O. Box 1264
Billings, Montana

Memorandum

To: Fred Buck, Helena, Montana
Earl Lloyd, Cheyenne, Wyoming
W. S. Hanna, Billings, Montana
J. J. Walsh, Bismarck, North Dakota

Subject: Draft of Compact

There is enclosed a rough draft of a possible Compact which I hope you can look over before our next meeting. It is based on these principles:

a. Existing rights are to be undisturbed and not administered under the Compact.

b. Each State is to be allotted sufficient water for its probable needs, to be consumptively used.

c. That the provisions made for the Yellowstone River will fit into any future Compact covering more, or all, of the Missouri River Basin.

d. That the total water production of an interstate basin is to be stored by the States concerned on the same basis. That is, an upper State is entitled to no special privilege by reason of its geography, and a lower

State must include in the compacted water its own intrastate production.

There are several variations of this theory that might be considered. Existing rights might be included, in which case the depletions would be in terms of virgin flow at the basin mouth; administration could be through State officials instead of by a Commission; and apportionment might be on the basis of a moving 5 or 10 year average. You can think of others.

I had in mind that the consumptive use figures to be inserted would be made up as follows:

a. Consumptive use of potential and *reasonably* possible irrigable areas.

b. Loses from potential new reservoirs.

c. Miscellaneous expected uses, such as stock water, spreaders, and industrial uses.

d. A generous factor of safety.

All this should total considerably less than the annual runoff of the streams as now depleted. The balance will be available for appropriation as provided in Article IX and for future apportionment by the Commission.

Indian rights, though the draft does not specifically state, would come out of the State's apportionment, and their priorities would be exercised with the State. I know of no case to date where Indian priorities have been exercised across State lines, although I

understand the Little Horn may provide one soon. At any rate, on the Big Horn this would actually involve Indians against Indians, since by the time a priority enforcement would be required the Indian rights in Wyoming would be about the only ones receiving water.

We will also want to consider including the Little Big Horn and Little Powder Rivers.

I am writing the Irma Hotel in Cody for reservations for Sunday night, September 24. I assume that we will finish in two days, arriving at Thermopolis on Tuesday night, and that Wednesday we will draft our report. Accordingly, I am writing the Carter Hotel for reservations on that date for all except Mr. Thornton. I am also having two members of our staff meet us there with aerial photos, maps, etc.

Very truly yours,

/s/ Carl L. Myers
Carl L. Myers, Chairman
Engineering Committee
Yellowstone Compact Commission

Enclosure

(Draft 9/18/50)

YELLOWSTONE RIVER COMPACT

The State of Montana, the State of North Dakota, and the State of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, have resolved to conclude a Compact as authorized under the Act of Congress of the United States of America, approved June 2, 1949 (Public Law 83, 81st Congress, First Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective Commissioners:

For the State of Montana:

For the State of North Dakota:

For the State of Wyoming:

who, after negotiations participated in by R. J. Newell, appointed as the representative of the United States of America, have agreed upon the following articles, to-wit:

* * *

ARTICLE V

A. There is hereby apportioned from the Yellowstone River System in perpetuity to the States of North Dakota, Montana, and Wyoming, respectively, exclusive of established rights and other uses coming within the provisions of paragraph D of this Article V, the consumptive use per annum of water, as follows:

Main Stem Yellowstone River

To Montana _____ acre-feet

To North Dakota _____ acre-feet

Powder River

To Montana _____ acre-feet

To Wyoming _____ acre-feet

Tongue River

To Montana _____ acre-feet

To Wyoming _____ acre-feet

Big Horn River

To Montana _____ acre-feet

To Wyoming _____ acre-feet

Clarks Fork River

To Montana _____ acre-feet

To Wyoming _____ acre-feet

B. The apportionment made to the respective States by paragraph A hereof shall be determined on an annual water year basis measured from October 1

of any year through September 30 of the succeeding year.

C. The consumptive use of water, which use is apportioned in paragraph A hereof, shall be determined for each State by the inflow-outflow method of terms of man made depletions in addition to existing depletions as of January 1, 1951.

D. There are hereby excluded from the provisions of this Compact:

1. Existing and future domestic and stock water uses of water: *Provided*, That the capacity of any reservoir for stock water so excluded shall not exceed 10 acre-feet.

2. Established rights to the beneficial use of water in each signatating State existing on January 1, 1951, including losses from reservoirs constructed prior to January 1, 1951.

ARTICLE VI

A. In the event that stream flow in the Yellowstone River System should be insufficient to meet the apportionment made herein, the shortage shall be prorated between the States concerned, according to their respective apportionments made in Article V.

B. If a signatory State, in any water year, shall have consumptively used more water than it was entitled to use under the apportionment made in Article V, such State, upon demand of the lower

State, shall deliver to the lower State during the next water year a quantity of water equal to its overdraft.

* * *

October 23, 1950

Mr. R. J. Newell
P. O. Box 1866
Boise, Idaho

Dear Mr. Newell:

At the joint meeting of the drafting and engineering committees of the Yellowstone River Compact Commission held in Billings, Montana on August 22-23, 1950, the engineering committee agreed to recommend a basis for the Yellowstone River Compact. This subject has been carefully considered by the committee, which herewith submits its report and recommendations.

* * *

There are two principles upon which a satisfactory allocation of the unused waters of the Yellowstone River could be based. One is the so-called divertible flow principle, which has been used in previous Yellowstone River Compact attempts. The other is the depletion principle as used in the Upper Colorado River Basin Compact. The committee feels, that since the divertible flow principle has been previously used as a basis for a compact, it should be retained, but modified to make the apportionment operative on other than a daily basis so that allocation could be in terms of cumulative volumes of water through an entire year, or portion thereof rather than by daily stream flow. . . .

* * *

YELLOWSTONE RIVER COMPACT COMMISSION

Minutes of Meeting
Oct. 24-25, 1950

The third meeting of the Yellowstone River Compact Commission was held at the Northern Hotel in Billings, Montana, on October 24 and 25, 1950, and was called to order at 10:05 a.m. by R. J. Newell, Chairman. . . .

* * *

The second job given the Committee was to attempt to prepare an article for inclusion in a draft of compact covering the apportionment of water. The Committee spent considerable time on this problem with the help of Mr. H. T. Person, Dean of Engineering at the University of Wyoming, and an Engineering Advisor to the Wyoming Commission, and Mr. J. R. Riter, Chief of Hydrology Division, Bureau of Reclamation. Two principles were considered for use in the preparation of the draft. The first is the depletion theory used in the Upper Colorado River Compact, which places a ceiling on the beneficial consumptive use of water permitted in each state. The second is the divertible flow theory which limits the amount or percentage of total amount of water which can be diverted in a state. The Committee believed that a modification of the divertible flow principle was most appropriate in this case, this being the principle considered in all previous compact negotiations on the Yellowstone.

* * *

There was discussion as to whether the Engineering Committee Report being considered by the group included the draft of Compact article. Mr. Leonard said that no Compact could be signed that asked Montana to give up rights to water now in use in Montana. Mr. Acker asked for a specific proposal, but Mr. Leonard replied that they would insist on recognition of the doctrine of appropriation.

* * *

Mr. Acker moved that the Report of the Engineering Committee be received for consideration and possible adoption of each of the principles stated. The motion was seconded by Mr. McNally and passed.

The items as identified by Mr. Burke in the Engineering Committee letter were considered as follows:

> 1. It is a generally accepted fact that irrigation development in the Yellowstone River Basin, particularly on the interstate tributaries, has very nearly reached its maximum practicable limit without the provision of additional new storage capacity.

It was moved and seconded to adopt this item, and the motion was carried.

> 2. The committee feels that clearing the way for this new storage should be the underlying objective of any interstate Compact.

It was moved and seconded that the item be adopted. Upon objection it was moved to amend the

motion to insert the words, "one of" between "be" and "the" and change the word, "objective" to "objectives." The amendment was carried, and the motion as amended was carried.

> 3. From an interstate standpoint, the situation in the Yellowstone River Basin is extremely favorable since on three of the four interstate tributaries there is a reservoir site at or near the State line which can provide adequate control of residual flows from the upper State for continued development in the lower State.
>
> 4. The fourth tributary, Clarks Fork, is not likely to experience water shortages.
>
> 5. The reservoir on Tongue River has already been constructed, and those on the Big Horn River and the Powder River are authorized by Congress for construction by the Bureau of Reclamation.

As to each of these items individual motions that the item be adopted were made, seconded, and carried.

* * *

> 12. There are two principles upon which a satisfactory allocation of the unused waters of the Yellowstone River could be based. One is the so-called divertible flow principle, which has been used in previous Yellowstone River Compact attempts. The other is the depletion principle as used in the Upper Colorado River Basin Compact.

13. The committee feels, that since the divertible flow principle has been previously used as a basis for a compact, it should be retained, but modified to make the apportionment operative on other than a daily basis so that allocation could be in terms of cumulative volumes of water through an entire year, or portion thereof rather than by daily stream flow. This is because substantially all new development will be based on storage rather than direct flow.

* * *

There was discussion on the item. Mr. Thornton moved to adopt the divertible flow principle as modified in accordance with Committee recommendations. The motion was seconded. Mr. Leonard stated that he favored the divertible flow principle, but objected to modification. In the following discussion Wyoming proposed leaving the question of modification open for the present. By consent the group adopted the divertible flow principle as a basis for Compact, modification to be considered later.

* * *

19. Some consideration must be given to supplemental water supply and since such water is for use on existing projects, it is felt that such allocation should be made under the category of existing irrigation works rather than potential.

It was moved and seconded that this item be adopted, and the motion was carried.

* * *

Mr. McNally referred to the draft paragraph in the Engineering Committee's Report and to corresponding paragraphs in the Leonard draft McNally-Wehrli draft and a Myers draft. He stated that Wyoming would not agree to interstate administration. He read from the draft paragraph by the Engineering Committee and stated that Wyoming wanted division of the water on an annual basis as provided for in this draft. He then read from a paragraph of the Myers' draft which used as a basis for division of water the allocation of beneficial consumptive use on an annual basis, October to September, placing a ceiling on the amount of water which can be consumptively used in each of the states. He read from the McNally-Wehrli draft which also provided for division on the consumptive use basis and from the Leonard draft which provided for the application of the Doctrine of Appropriation on an interstate basis. Mr. McNally stated that he objected to interstate administration. He stated that he would insist on "equitable apportionment" which includes priorities and other factors. He stated that if agreement could be reached on the language to be used in the article, of which he read from several examples, and on the question of interstate administration, then agreement could be reached on a compact.

* * *

Mr. Leonard insisted that under the Doctrine of Appropriation state lines must be wiped out. He insisted on recognition of established rights under

interstate administration, and on apportionment of natural flow, not storage.

* * *

. . . Mr. Myers asked specifically whether the Commission wanted to operate on a daily basis or on an annual basis , subject to check as required. Mr. Bower moved to have operations on an annual basis with provisions to make a check at any time desirable, but not required on a daily basis. The motion was seconded. In respect to a question, Mr. Buck stated he agreed to the annual basis with provision to check as required. The motion was passed.

* * *

Proposals made by P. F. Leonard
as a member of the drafting committee
of the Yellowstone River Compact

* * *

ARTICLE V

A. The states of Montana, North Dakota and Wyoming hereby agree that the waters of the Yellowstone River and its interstate tributaries shall be apportioned among said states as follows:

Appropriative water rights in the Yellowstone River Basin, including the Clarks Fork, Big Horn River, Tongue River and Powder River existing as of January 1, 1950, shall continue to be enjoyed in accordance with the general law governing the acquisition and use of waters under the Doctrine of Appropriation and on the basis of priorities thereunder as single streams and regardless of state lines.

* * *

YELLOWSTONE RIVER COMPACT COMMISSION

Minutes of Meeting
Dec. 7-8, 1950

The fourth meeting of the Yellowstone River Compact Commission was held at the Northern Hotel at Billings, Montana on December 7 and 8, 1950, and was called to order at 10:15 a.m. by R. J. Newell, Chairman.

* * *

The Chairman stated that the meeting had been called for the purpose of considering the draft of Compact prepared by the Engineering Committee with the advice and assistance of Mr. Burke, pursuant to instructions given at the third meeting, and distributed to the Commissioners by mail. He stated that the draft would be read and considered, article by article, and that as rapidly as possible a Compact would be finally typed for approval as a whole.

* * *

. . . Mr. Burke discussed the basis on which the Compact was drafted and the general theory of the Compact. Yields of the basin are to be burdened by (1) existing appropriative rights and (2) supplemental water for existing developments. The remainder, the unappropriated and unused water, or residual water, is to be compacted. He called attention to an ambiguous situation in the language of paragraph B respecting supplemental water rights and suggested rewriting paragraph B as follows:

B. Of the unused and unappropriated waters of the interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory state such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation, and the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows:

* * *

Paragraph C was read. Mr. Burke suggested, as clarifying language which should have been included in the original draft, that the word "above" in the first line be stricken, a comma added after "allocations", and the following wording: "in paragraph B1, 2, 3 and 4 of this Article V,". A motion was made, seconded, and carried to approve the paragraph as clarified.

Paragraph C 1, C 2 , C 3, and C 4 were read, and as to each a motion was made, seconded, and carried that it be approved.

* * *

The meeting reconvened at 8:15. Paragraphs VII A, B, and C were read, and as to each a motion was made, seconded, and carried that it be approved.

* * *

The complete Compact as previously approved paragraph by paragraph was presented and read in its entirety. Mr. Buck moved that the Compact as read be adopted. The motion was seconded and by Mr. Bower and unanimously carried.

* * *

Upon signature of the Compact, the meeting adjourned at 11:45 a.m.

* * *

82D CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
No. 1118

GRANTING THE CONSENT AND APPROVAL OF CONGRESS TO A COMPACT ENTERED INTO BY THE STATES OF MONTANA, NORTH DAKOTA, AND WYOMING RELATING TO THE WATERS OF THE YELLOWSTONE RIVER

OCTOBER 10, 1951. – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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MR. ENGLE, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H. R. 3544]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H. R. 3544) granting the consent and approval of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

* * *

PURPOSE OF THE BILL

The negotiation of the Yellowstone River Basin compact was an important stop toward full utilization

of the waters of the Yellowstone River. The consent of the Congress to the compact entered into by the States of Montana, Wyoming, and North Dakota will be another forward move toward maximum beneficial use of these waters without, unnecessary conflict between the States over the right to its use.

It has long been recognized that the maximum beneficial use of the water resources of the Yellowstone River in the Missouri River Basin is dependent upon the construction and operation of storage reservoirs. A plan for such reservoirs was set forth in Senate Document No. 191, Seventy-eighth Congress. If such a plan is to become a reality for the Yellowstone River Basin, construction of storage reservoirs will be required at sites at or near the Wyoming-Montana line so that the residual flows from Wyoming can be controlled for use in the lower States of Montana and North Dakota.

REASONS FOR THE AMENDMENTS

One of the reasons for the numerous amendments is to make H. R. 3544 conform to Senate bill 1311. Also, other amendments were made to correct H. R. 3544 so it reads exactly as the official copy of the compact adopted by the States.

EXPLANATION OF THE BILL

Article V of the compact is the article that sets out the apportionment of the benefits of the water resources of the basin among the signatory States

that they have agreed upon. Extensive studies by an engineering committee, appointed by the commission to advise it, disclosed that little could be gained, from a water-supply standpoint by attempting, in the compact, the regulation and administration of existing appropriative rights in the signatory States. (The engineering committee comprised the State engineers of the three States and two Federal engineers from the Bureau of Reclamation and the Bureau of Indian Affairs.)

Accordingly, paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Paragraph B of article V is the core of the compact. The following analysis of this paragraph is made:

(1) The unused and unappropriated waters of the interstate tributaries only are treated – i. e., the waters that are residual to these required for the enjoyment of the appropriative rights that are recognized in paragraph A of article V.

(2) The supplemental water supplies that are needed for the better enjoyment of the rights recognized in paragraph A of article V are given a preferred status over water supplies for new projects.

(3) The water that is residual after the enjoyment of the rights in paragraph A of article V and after the furnishing of the supplemental water supplies to the projects with the rights recognized in paragraph A are allocated to Wyoming and to Montana in stated percentages. I am informed that these percentages were calculated, in accordance with the recommendation of the engineering committee, by dividing the total of the potential and possible acres in Wyoming and in Montana by the total of the potential and possible acres in both States.

In paragraph C of article V, there is adopted a modified version of the divertible flow principle. Under the formula adopted, the apportionments stated in paragraph B are made operative in terms of cumulative volumes of water throughout a water year, fixed as October 1 of any year through September 30 of the succeeding year, in order to accommodate the new projects in the basin which must rely on storage water rather than on natural flow.

* * *

HON. JOHN R. MURDOCK,
Chairman, Committee on Interior and Insular Affairs, House of Representatives, Washington, D. C.

MY DEAR MR. MURDOCK: I have for report H. R. 3544, a bill granting the consent and approval of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming, relating to the waters of the Yellowstone River. . . .

* * *

In paragraph C of article V, there is adopted a modified version of the divertible flow principle. Under the formula adopted, the apportionments stated in paragraph B are made operative in terms of cumulative volumes of water throughout a water year, fixed as October 1 of any year through September 30 of the succeeding year, in order to accommodate the new projects in the basin which must rely on storage water rather than on natural flow.

Considered with paragraph A of article V, paragraph D of article V gives to the lower Yellowstone Federal reclamation project in Montana and North Dakota the protection of a right existing on January 1, 1950. Additionally, paragraph D recognizes all rights to the beneficial use of water that existed in Montana and North Dakota on January 1, 1950, and that divert below Intake, Mont, and it permits the beneficial use of the flow of water of the Yellowstone River below Intake, Mont., on lands within Montana and North Dakota on a proportionate basis of acreage irrigated. This latter provision is important, particularly to North Dakota, because the flow of water of the Yellowstone River below Intake, Mont., will be residual water after the use of water above Intake, Mont. The flow will thus be not only a regulated flow, as a consequence of the construction and operation of the reservoirs at the strategic sites on the Big Horn River, the Tongue River and the Powder River, but it will also include the return flows that are certain to appear below Intake, Mont., with the expansion of irrigation after storage water becomes available. The

sharing of this residual flow by Montana and North Dakota, on a proportionate basis of acreage irrigated, will keep the new developments in the two States in balance and minimize future interstate disputes.

* * *

Calendar No. 837

82D CONGRESS *1st Session*	SENATE	REPORT No. 883

GRANTING THE CONSENT OF CONGRESS TO A COMPACT ENTERED INTO BY THE STATES OF MONTANA, NORTH DAKOTA, AND WYOMING RELATING TO THE WATERS OF THE YELLOWSTONE RIVER

OCTOBER 2 (legislative day, OCTOBER 1), 1951.
– Ordered to be printed

MR. O'MAHONEY, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany S. 1311]

The Committee on Interior and Insular Affairs, to whom was referred the bill (S. 1311) granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River, having considered the same report favorably thereon without amendment and with the recommendation that the bill do pass.

THE PURPOSE OF THE BILL

The bill would give the consent of Congress to a compact entered into between the States of Montana,

North Dakota, and Wyoming providing for an equitable division of the use of waters from the Yellowstone River and its tributaries. Public Law 83, Eighty-first Congress, approved June 2, 1949, gave the consent of Congress to negotiate and enter into a compact, provided for the appointment of a Federal representative to represent the United States in the negotiations and to report thereon to the Congress. The compact was agreed to by the several representatives of the affected States at Billings, Mont., on December 8, 1950, and the States ratified the compact early in 1951.

APPORTIONMENT OF USE OF WATER

The compact appears to be fair and equitable in apportioning the use of waters of the Yellowstone Basin, as defined. The compact provisions are easily administered, and require no elaborate organization. In all respects, it presents an unusually practicable solution to the problems which, during the early years of negotiations, seemed highly complicated and difficult.

The Yellowstone River Basin and the Yellowstone River system (i. e., the river and its tributaries) are, for the purposes of the compact, exclusive of the Yellowstone National Park area and its waters, and the waters of the Little Bighorn River.

The apportionment, or division, of the waters of the basin is provided in article V, subsections A, B, and D, as follows:

V-A. Existing appropriative rights as of January 1, 1950, are recognized in each of the signatory States. No regulation of the supply is mentioned for the satisfaction of those rights, and it is clear, then, that a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing. Where these rights have deficient supplies they would be supplemented by rights obtained from "unused and unappropriated waters" in the basin as of January 1, 1950, from the allocated waters under subsection B. North Dakota rights are covered specifically in subsection D.

V-B. Unused and unappropriated waters as of January 1, 1950, of the four interstate tributaries, the Clarks Fork of the Yellowstone, the Big Horn, Tongue, and Powder Rivers, all of which rise in Wyoming and join the main stem of the Yellowstone River in Montana, are allocated in variable percentages between Montana and Wyoming. The definition of these waters is found in subsection C of article V. The allocations (by the method of computation of the waters not appropriated and used as of January 1, 1950) are percentages of divertible and storable waters in each tributary basin during any water year or at any time in the water year after its beginning (October 1). Allocations, thereby, take into account return flows and uses of them as well as original runoff. This results from the computation directive which says, in effect, that allocated flows are the sum of diversions

and outflows from the tributary basin corrected for changes in the storage of such waters.

* * *

BOISE, IDAHO, *March 16, 1951.*

Hon. ALBEN W. BARKLEY,
President of the Senate, Washington, D. C.

MY DEAR MR. PRESIDENT: I have the honor to enclose a conformed copy of a compact entered into on December 8, 1950, among the States of Montana, North Dakota, and Wyoming to determine the rights and obligations of those States respecting uses of the waters of the Yellowstone River and its tributaries.

By virtue of my appointment by the President as the representative of the United States, I participated in the negotiations which led to the compact. My report thereon is enclosed.

Sincerely yours,

R. J. NEWELL,
Representative of the United States,
Yellowstone River Compact Negotiations.

REPORT TO THE CONGRESS BY THE FEDERAL REPRESENTATIVE ON THE YELLOWSTONE RIVER COMPACT

By the act of June 2, 1949 (Public Law 83, 81st Cong.), Congress granted its consent to the States of Montana, North Dakota, and Wyoming to negotiate and enter into a compact or agreement for the division of the waters of the Yellowstone River excepting

waters within or tributary to the Yellowstone National Park.

Commissioners representing these States, after negotiations extending over a year, have reached final agreement on the provisions of the proposed compact at a meeting held in Billings, Mont., on December 7 and 8, 1950, and each one of them has affixed his signature thereto. The State Legislature of Wyoming ratified the agreement by an act signed by the Governor on January 27, 1951. Montana's Legislature likewise approved and the Governor signed on February 13, 1951, and North Dakota's Legislature approved and the Governor signed on March 7, 1951.

The authorizing act required that a Federal representative be appointed to participate in the negotiations and to report to the Congress on the proceedings and on any compact or agreement entered into. Accordingly, the President, on October 19, 1949, appointed me as such Federal representative, and I have participated in the negotiations of the commissioners and hereby report as directed.

I believe that the proposed compact is a sound basis for further development in the use and control of waters of the Yellowstone River for multiple purposes especially for irrigation, that the division of the waters among the States as agreed on is equitable, and that the rights of the United States are properly protected, and, therefore, I recommend that the consent of Congress be given the proposed compact, a copy of which is attached.

Further report follows:

PREVIOUS NEGOTIATIONS

Three previous compacts have been negotiated on the Yellowstone River. The first of these was signed in February 1935. It concerned only the States of Montana and Wyoming, and was never acted upon by the legislatures. The second compact was negotiated in 1942 and went to the legislatures in 1943. This concerned the three States – Montana, Wyoming, and North Dakota. The Wyoming Legislature was the first to take action on this compact and failed to ratify it. A third compact, quite similar in form to the previous compact, was negotiated in 1944, and reached the Legislatures of Montana, Wyoming, and North Dakota in 1945. This compact was ratified by North Dakota, Montana, and by the Legislature in Wyoming, but was vetoed by the Governor of Wyoming. The present compact is therefore the fourth that has been negotiated by Montana and Wyoming, and the third to concern all three States.

* * *

PURPOSES

The major purposes of the proposed compact, as stated therein, are to promote interstate comity, to remove causes of present and future controversy between the States with respect to the waters of the Yellowstone River and its tributaries, to provide for an equitable division and apportionment of such waters and to encourage the beneficial development

and use thereof. Installation of physical works needed to foster that use has been delayed pending an agreement between the States as to division of waters.

* * *

NEGOTIATIONS

Four formal meetings of the full commission, all at Billings, Mont., were held on the following dates: November 29, 1949; February 1 and 2, 1950; October 24 and 25, 1950; December 7 and 8, 1950.

Minutes of these meetings were made and adopted officially by the commissioners. They have been assembled and labeled "Yellowstone River compact – Minutes of formal meetings of the Yellowstone River compact commissioners." They are not being sent out as part of the text of this report, but copies are being furnished for the official files of the appropriate committees of Congress and for the General Services Administration of the United States for filing with the original of the compact. Each of the meetings was well attended, though three were held in winter and the commissioners came from widely scattered points over a huge area. Meetings were open to the public and the press. Because of the size of the group, including 30 commissioners and a number of advisers, consultants, and other interested parties, much of the detail work of collecting and digesting information and drafting language had to be done in smaller committees. Informal meetings of

representatives of interested Federal agencies were held on November 28, 1949, and February 2, 1950.

A drafting committee made up of attorneys from each of the three States held one meeting in August 1950, and attempted to draft language satisfactory to all parties.

However, most of the ground work was laid most of the material gathered and most of the questions answered by an engineering committee made up of the State engineers of the three States, the area engineer of the Bureau of Indian Affairs, and the district engineer of the Bureau of Reclamation, Yellowstone district, and assisted on occasion by numerous others, from private, State and Federal ranks, who had information of value to offer. This committee held a number of meetings and made one field trip throughout the length of the Big Horn River (largest tributary of the Yellowstone) to check field data on the ground.

MAIN FEATURES OF THE COMPACT

The compelling reason for the negotiation of a compact was the need for agreement on division of the waters of interstate tributaries in the Yellowstone River Basin that would allow further development to go forward. Because the main stem of the river is almost entirely in Montana and its water supply under any future program appears adequate for feasible developments along its course, it was given little consideration in the negotiations. While North

Dakota representatives contributed in an important measure to the work of the commission, the real interest of the State in the compact is minor on account of the very small part of the drainage basin that is within its borders. The waters in Yellowstone National Park and tributary thereto were expressly excluded by the language of the authorizing act. The real problem and the purpose of the undertaking was then to divide the waters of four principal tributaries, the Clarks Fork, Big Horn, Tongue, and Powder, all rising in Wyoming and flowing across the State line into Montana, with developments, existing and proposed, in both States.

In earlier attempts to arrive at a compact and in the early meetings here reported, there was searching discussion as to whether the agreement sought on division of waters should include the water now appropriated and in use or should apply only to the unappropriated and unused balance which is available for further development. The latter principle was decided on (art. V-A) for several reasons. First, it would be a huge and time-consuming task to determine and fix comparable values for existing rights in three States with differing water laws and practices in establishing water rights. Second, the basic fact that there is enough water if properly conserved by storage to take care of all existing and all feasible future developments points up the importance of arriving promptly at the simplest workable agreement that would permit such storage projects to proceed. When these are built, even the operation

provisions of the compact are expected to become easy of administration.

It is further agreed (art. V-B) that existing irrigation developments with an inadequate supply should have a preferred right to the unused remainder over new projects.

The final residue of supply was then divided between the States for further development. The basis for the division on each tributary was the acreage of land in each State that could be feasibly irrigated from that tributary, the requirements used to determine feasibility being the same in each State.

* * *

In determining the amount of water subject to allocation, the "divertible flow" principle was chosen over the "depletion" principle, because the former had been used in earlier negotiations and was more familiar to the commissioners, who were assured by the consultants that the latter had no outstanding advantages even though it had been selected on the upper Colorado.

* * *

CONCLUSION

The effort that has been carried on by the States for nearly 20 years to secure a compact for the division of the waters of the Yellowstone River and its tributaries would seem to be conclusive evidence that such a compact is needed. The instrument submitted herewith is the result of a year's intensive study and

discussion by a large number of qualified State commissioners with the benefit of all past negotiations and the cooperation of many Federal agencies and private individuals, ending finally in agreement by all. The plan proposed appears to be easily installed, workable, and not requiring the establishment of a large new organization for its operation. The division of the waters is believed to be equitable and fair. Obstacles to the continued orderly development of resources would be removed. The rights of the United States seem to be fully protected. Therefore I recommend that the proposed compact be approved by the Congress of the United States.

R. J. NEWELL,
Federal Representative,
Yellowstone River Compact Negotiations.

* * *

HON. JOSEPH C. O'MAHONEY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington 25, D. C.

MY DEAR SENATOR O'MAHONEY: I have for report S. 1311, a bill granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming, relating to the waters of the Yellowstone River. . . .

* * *

The practical accomplishment, in the circumstances, of an equitable apportionment of the benefits of the waters of the Yellowstone River system among the States of Wyoming, Montana, and North Dakota

will require the construction, at strategic sites, at or near the Wyoming-Montana State line, of storage reservoirs so that the residual flows from Wyoming can be controlled and conserved for use in the lower States of Montana and North Dakota. Fortunately, such strategic reservoir sites are available on the Big Horn River, the Tongue River, and the Powder River.

* * *

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

Sincerely yours,

OSCAR L. CHAPMAN,
Secretary of the Interior.

FIRST ANNUAL REPORT

YELLOWSTONE RIVER
COMPACT COMMISSION

1952

* * *

The Commission being satisfied that the allocations of the upstream state or states were not approached for the period ending September 30, 1952, did not factually determine the extent of allocable use.

* * *

ELEVENTH ANNUAL REPORT

YELLOWSTONE RIVER COMPACT COMMISSION

1962

* * *

The substantial flows of the year were indicative that the prescribed shares of Wyoming were not exceeded and no attempts at detailed administration were made. Mr. J. W. Ross told the Commission that critical situations of water supply arose on the Clark's Fork of Yellowstone River during 1961 and may be expected again with greater severity. He had no information to indicate that Wyoming has exceeded its prorata share. He stated new pumping installations have been made or are ready for installation in both states. Mr. Ross said clarification of water rights in Montana should be undertaken for proper administration of the Compact when that should become necessary and also for apportionment of limited flows in Montana. The Commission assured him of its desire to assist in matters pertinent to the Compact, but suggested the division of waters within either State was a matter of local or State control.

* * *

Diversions:

The Commissioners for Montana and Wyoming are agreed that allocable uses under the Compact were less than the proportionate shares in either

State. The Compact only provides for the allocation of water uses originating after January 1, 1950.

* * *

DRAFT REPORT
A COOPERATIVE PLAN TO ADMINISTER THE YELLOWSTONE RIVER COMPACT

by

Dan Ashenberg
Water Resources Division
Department of Natural Resources and Conservation

November, 1983

* * *

. . . The issue of reusing return flows is important to both states because Article V apportions flow based on diversions not on depletions.

* * *

November 29, 1989

YELLOWSTONE RIVER COMPACT
by
Water Management Bureau
Water Resource Division
DNRC

* * *

9. DIVERSION VERSUS DEPLETION.

ISSUE: The apportionment formula in Article V is based on diversions and not depletions. When agriculture is the predominate use, diversions is a reasonable basis for determining the apportionment. Since the initiation of the 1970's and the increase in industrial use with little or no return flows, the use of diversions may not be the most appropriate measurement to use. Moreover, the apportionment mixes two types of water (divertable and diversionary flows) that makes it impossible to balance water apportioned to the two states.

WYOMING POSITION: Wyoming sees no problem with the use of the four measurements as defined in Article V as the basis for apportionment.

MONTANA POSITION: Montana believes that it is possible to prepare a water budget based on the two types of flows used in the apportionment. The only way the apportionment formula can work properly would be to use similar units. All units should be converted to their divertable flow equivalents. conversely, divertable flow equivalents could be converted back to depletable flows when it is necessary

to calculate the quantity of water to be released from storage.

* * *

YELLOWSTONE RIVER

COMPACT COMMISSION

FIFTY-THIRD ANNUAL REPORT

2004

* * *

Mr. Stults stated that 2004 flows in the Tongue River in Montana were deficient such that water rights senior to 1950 were not filled. Due to the continuing drought in the basin and the likelihood that average runoff will not fill depleted reservoirs, Montana and Wyoming should discuss an equitable plan so that users in both States get a fair share of the water in 2005 according to Article V of the Yellowstone River Compact. Montana felt that water rights in both States senior to 1950 should be filled before water rights junior to 1950 are filled. Montana specifically requested that Wyoming release post-1950 stored water so that pre-1950 users in Montana could satisfy their water rights. Wyoming indicated that this call would not be heeded as Wyoming believes there is no legal basis for making such deliveries.

* * *

Yellowstone River
Compact Commission
Fifty-Fifth Annual Report
2006

* * *

Table 10. Water-year-end contents for Yellowstone River Compact reservoirs[1] or

[Contents are in acre-feet. Reservoirs or lakes are listed in alphabetical order by dr
Symbol: –, no data or not available]

Reservoir or lake name	Pre-compact 1950 water right	Post-compact 1950 water right	Usable capacity	Usable contents on Sept. 30, 2008	Usabl conten on Sep 30, 200
		Bighorn River basin			
(Lake) Adelaide Reservoir[2]	1,450	4,760	6,210	450	2,00
Anchor Reservoir[3]	17,410	0	17,410	233	26
Bighorn Lake[3]	–	1,116,000	1,312,000	745,800	984,50
Boysen Reservoir[3]	701,500	0	701,500	407,700	591,90
Buffalo Bill Reservoir[3]	456,600	190,000	646,600	441,100	450,30
Bull Lake[3]	152,000	0	152,000	50,540	66,10
Greybull Valley Reservoir[2]	0	33,170	33,170	322	8,00
Pilot Butte Reservoir[3]	34,600	0	34,600	1,020	12,30
Sunshine Reservoir[2]	52,990	0	52,990	5,960	24,00
Lower Sunshine Reservoir[2]	42,640	42,300	84,940	720	21,00
		Powder River basin			
Cloud Peak Reservoir[2]	3,400	172	3,570	0	3,57
Dull Knife Reservoir[2]	–	4,320	4,320	63	1,31
Healy Reservoir[2]	–	5,140	5,140	1,336	4,65
Kearney Reservoir[2]	1,850	4,470	6,320	1,085	2,64
Lake DeSmet[3]	37,520	197,500	235,000	187,278	206,67
Muddy Guard Reservoir[2]	–	2,340	2,340	500	49
Tie Hack Reservoir[2]	1,650	2,440	2,440	1,921	2,44
Willow Park Reservoir[2]	4,460	–	4,460	451	2,89
		Tongue River basin			
Bighorn Reservoir[2]	2,750	1,880	4,630	584	67
Cross Creek Reservoir[1]	–	798	798	309	47
Dome Reservoir[2,4]	1,840	188	2,030	1,209	1,17
Granger Reservoir[2]	146	–	146	0	
Last Chance Reservoir[2]	90	–	90	0	
Martin Reservoir[2]	561	–	561	0	
Park Reservoir[2]	7,350	3,020	10,360	3,088	4,68
Sawmill Lakes Reservoir[2]	–	1,280	1,280	746	82
Tongue River Reservoir[3]	79,070	–	79,070	42,720	43,76
Twin Lakes Reservoir[5,6]	1,180	2,220	3,400	2,842	3,01
Weston Reservoir[2]	370	–	370	0	
Willits Reservoir[2]	79	–	79	0	

[1]Wyoming disagrees with the term "Compact reservoirs" as used throughout report. Wyoming's acceptance of this annual report should not be construed as acceptance of the use of that term.2 Reservoirs managed by the State of Wyoming.

[2]Reservoirs managed by the State of Wyoming.

[3]Reservoirs managed by Bureau of Reclamation.

[4]Data are combined contents of Dome Lake and Dome Lake Reservoir.

[5]Reservoir managed by State of Montana.

[6]Data are combined contents of Twin Lakes Number 1 and Twin Lakes Number

No. 137, Original

IN THE

Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING AND
STATE OF NORTH DAKOTA,

Respondents.

On Motion to Dismiss Bill of Complaint

MOTION OF ANADARKO PETROLEUM CORPORATION FOR LEAVE TO FILE *AMICUS* BRIEF AND *AMICUS* BRIEF IN SUPPORT OF RESPONDENT STATE OF WYOMING

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RULE 29.6 DISCLOSURE STATEMENT

Anadarko Petroleum Corporation has no parent corporation, and no publicly held company owns ten percent or more of the corporation's stock.

No. 137, Original

IN THE

Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING AND
STATE OF NORTH DAKOTA,

Respondents.

On Motion to Dismiss Bill of Complaint

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Anadarko Petroleum Corporation ("Anadarko") moves for leave to file the attached *amicus* brief in support of the Motion to Dismiss filed by Wyoming on April 4, 2008. On April 2, 2008, this Court extended the briefing schedule to provide that *amicus* briefs supporting Wyoming are due April 25, 2008.

Counsel for *amicus* contacted counsel for the parties, and have been advised that Wyoming consents to the filing of this brief; Montana does not consent to the filing; and North Dakota does not object.

This is an original action brought by Montana, alleging that Wyoming has breached the Yellowstone

River Compact ("Compact"). North Dakota is also a party to the case because it is a party to the Compact, but it appears to have no interest in this controversy.

Among other assertions, the Complaint alleges that Wyoming has violated Montana's rights under the Compact by "allow[ing] the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins . . .." Compl. ¶11. The Tongue and Powder Rivers flow from Wyoming into Montana, where they join the Yellowstone River. As tributaries of the Yellowstone River, they are covered by the Compact.

Anadarko is an independent oil and gas exploration and production company. It has extensive oil and gas leaseholds in the areas surrounding the Powder River in Wyoming. In order to develop these leaseholds, Anadarko engages in coalbed natural gas or "CBNG" production. Production of CBNG, also referred to as coalbed methane or "CBM," is a process whereby water is pumped from coal seams to free natural gas otherwise trapped in the coal. The CBNG process accounted for 9.4 percent of the natural gas production of this country in 2006, and that share is growing. *See* Judith Kohler, *Study begins on coal-bed methane water*, Caspar Star-Tribune Online, Apr. 9, 2008, http://www.trib.com/articles/2008/04/09/news/wyoming/9816566e6c8c75d8872574260001aefc.txt. *See also* Energy Information Admin., Coalbed Methane Proved Reserves and Production, http://tonto.eia.doe.gov/dnav/ng/ng_enr_cbm_a_EPG0_r52_Bcf_a.htm.

If Montana were to prevail, Anadarko's ability to produce natural gas from coal beds in the area of the Powder River could be adversely affected. Wyoming

does not adequately represent Anadarko's interests. A principal issue in the case is whether the Compact covers groundwater. Wyoming is seeking to protect all groundwater (including groundwater used for irrigation) from regulation under the Compact. While Anadarko agrees with Wyoming's position in this regard, Anadarko—as explained in the attached brief—also believes that water produced in association with CBNG would not be covered by the Compact even if the Court determines that groundwater generally may be covered. This is a significant point that Anadarko cannot rely on Wyoming to fully develop.

Anadarko has a "direct stake in this controversy," and its participation would contribute to "a full exposition of the issues" involved. *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). In these circumstances, *amicus* participation is appropriate. *New Jersey v. Delaware*, 128 S. Ct. 1410 (2008) (citing *amicus* brief filed by BP America, Inc. and Crown Landing LLC).

Respectfully submitted,

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Dated: April 25, 2008

No. 137, Original

IN THE

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Plaintiff,

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STATE OF WYOMING AND
STATE OF NORTH DAKOTA,

Respondents.

On Motion to Dismiss Bill of Complaint

AMICUS BRIEF IN SUPPORT OF RESPONDENT STATE OF WYOMING

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INTEREST OF THE *AMICUS*[1]

Anadarko Petroleum Corporation ("Anadarko") is an independent oil and gas exploration and production company. It has extensive oil and gas leaseholds in the areas surrounding the Powder River in Wyoming. Anadarko engages in the extraction of natural gas from coal seams in these areas, referred to as coalbed natural gas ("CBNG") or coalbed methane ("CBM"). That activity requires the pumping of water located in the coal seams to the surface. Paragraph 11 of Montana's Complaint specifically targets that pumping, which it alleges has caused a violation of the Yellowstone River Compact, 65 Stat. 663 (1951) ("Compact").[2]

STATEMENT

Montana alleges that Wyoming has allowed "the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins." Compl. ¶11. Montana alleges that Wyoming's action has "depleted and is threatening further to deplete the waters of the Tongue and Powder Rivers allocated to the State of Montana under Article V of the Compact." Compl. ¶13.

---

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. Wyoming consents to the filing of this brief. Montana does not consent, and North Dakota does not object. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] The Compact is reprinted in the Appendix to the State of Montana's Bill of Complaint ("Compl. App.").

The coal reserves that underlie the Tongue and Powder River Basins are several hundred feet below the ground and contain extensive reservoirs of natural gas. The natural gas is trapped by groundwater that fills the interstitial areas of the coal reserves. Extraction of the natural gas is accomplished by drilling a conventional well into the coal seam and pumping the trapped water to the surface to reduce water pressure. This pumping releases the trapped natural gas, which is transported to the surface through a separate well bore, captured, and piped to market. The water pumped to the surface then may be either discharged to the surface or reinjected into the ground.[3]

The Ninth Circuit has held that CBNG groundwater extracted from coal seams underlying the Powder River Basin cannot be discharged into the Powder River without a permit under the Clean Water Act, 33 U.S.C. §§1251-1387. *N. Plains Res. Council*, 325 F.3d at 1161. That court rejected an argument that a permit is unnecessary because the CBNG process does not alter the discharged groundwater, reasoning that the discharge could affect the chemical integrity of the River into which it is discharged because "the [CBNG] water would not flow into the Tongue River but for [the company's] methane extraction processes." *Id.* at 1162. The Ninth Circuit concluded that the case was "practically indistinguishable" from cases holding that "transporting water from one water body to

[3] This description is largely taken from *Northern Plains Resource Council v. Fidelity Exploration & Development Co.*, 325 F.3d 1155, 1158 (9th Cir. 2003). While the court describes the CBNG process as it takes place in areas of Montana surrounding the Powder River, the description is accurate for Wyoming as well.

another can violate the [Clean Water Act]." *Id.* at 1163. The CBNG operator is not diverting groundwater from the river, if without the pumping it would not reach the river.

SUMMARY OF ARGUMENT

The Yellowstone River Compact was premised on the assumption that there would continue to be ample water in the Yellowstone River and its tributaries to supply pre-1950 needs, as well as future needs, if sufficient reservoirs were built. The Compact was written to facilitate construction of various water storage projects, and to allocate the surface flows of the River the drafters assumed would remain after existing uses (*i.e.*, pre-1950) were satisfied. That is why the Compact creates no new rights for existing users, instead leaving them to the rights they enjoyed under existing water law, and confines its allocative system to new uses. That is also why the Compact did not cover groundwater. The drafters did not envision that depletion of the Yellowstone River System would be a problem, and thus did not include an anti-depletion clause that, in other Compacts, has been the basis for a finding of groundwater coverage. Nor did they attempt to address in the Compact the entire water supply of the geographic areas covered by the Compact. Rather, they sought only to allocate the "unused and unappropriated" waters of the Interstate tributaries of the Yellowstone River (*i.e.*, the actual surface water flowing between the States) (Art. V.B), which they assumed would always remain available for allocation and would be sufficient to meet current and future needs.

The plain text of the Compact confirms the drafters' intent to limit its coverage to direct diversions of

surface water. The Compact's definition of covered waters is limited to the Yellowstone River itself, its tributaries, and springs and swamps. Art. II.D. Groundwater is not mentioned. The Compact's limits are confined to "diversions" from the surface flow of the river system, and the Compact's percentage allocations are based exclusively on surface flow. Art. V.B.

Even if the Compact could somehow be read to reach some groundwater, it should not be read to reach water extracted during the CBNG process. CBNG extraction involves the pumping of deep groundwater. Typically, without pumping, CBNG waters pumped from deep seams would not naturally reach the surface of the Powder River and be available for diversion in Montana. *See N. Plains Res. Council*, 325 F.3d at 1158 ("Because CBM water comes from deep underground aquifers, it would not reach the Tongue River were it not for [the company's] extraction process."). The pumping of CBNG waters that would not naturally reach the surface of a river flowing in Montana cannot form the basis of a valid Compact claim by Montana.

Montana relies exclusively on Article V.A—the Compact's only provision relating to pre-1950 rights. Article V.A, however, confers no rights under the Compact on pre-1950 users. Article V.A states only that pre-1950 rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." That plainly confers no rights under the Compact. Instead, Article V.B regulates and allocates post-1950 rights, and Montana asserts no violation of Article V.B. Its claim must therefore be dismissed.

ARGUMENT

I. THE YELLOWSTONE RIVER COMPACT DOES NOT COVER GROUNDWATER.

A. The Plain Language Of The Compact Does Not Cover Groundwater.

The State of Wyoming is correct in its contention that the Compact does not regulate groundwater use. The core of the Compact is Article V, and the key terms of that Article are defined expressly to include only surface water, in stark contrast to the language of other interstate-river compacts this Court has considered previously.

Article V.A preserves pre-1950 "*[a]ppropriative rights* to the beneficial uses of the water of the *Yellowstone River System*." Article V.B allocates "unused and *unappropriated* waters of the *Interstate tributaries* of the Yellowstone River" as of January 1, 1950. (Emphasis added). Such unused and unappropriated water is allocated first in such quantities as necessary to provide supplemental waters for pre-1950 rights, to be acquired and enjoyed "under the doctrine of appropriation." Art. V.B. The remainder is allocated to each State "for storage or *direct diversions* for beneficial use" according to specified percentages. *Id.* (emphasis added). The percentages vary according to the different rivers involved, with a different "point of measurement" for each river. *Id.* For each river and point of measurement, the quantity of water subject to the percentage allocations is the "quantity of water, in acre-feet, that passed the point of measurement," plus the "total *diversions* . . . above the point of measurement," plus the net change in storage above the point of measurement. Art. V.C (emphasis added).

This language describes a system that is solely focused on allocation of surface flow. That is confirmed by the Compact's definitions of "Yellowstone River System," "Tributary," "Interstate Tributaries" and "diversion." Article II defines these terms in a manner that is limited to the surface water of the rivers, including springs and swamps. None of the definitions can naturally be read to cover groundwater.

Thus "Yellowstone River System" is defined to mean "the Yellowstone River and all of its tributaries, including springs and swamps . . .." Art. II.D. "Tributary" means "any stream which in a natural state contributes to the flow of the Yellowstone River," and "Interstate Tributaries" means certain named rivers, including the Powder and the Tongue. Arts. II.E, II.F. The ordinary meaning of "stream" refers to the surface water of a river, and the drafters of the Compact included "springs and swamps" but included no reference to groundwater. Springs and swamps, like the rivers themselves, are at the surface, while groundwater is not. Thus, the waters that the Compact lists as covered share a common characteristic that groundwater lacks. The fact that "the items expressed are members of an 'associated group or series,' justifies] the inference that [an] item[] not mentioned [was] excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)).

The inference that the drafters did not exclude groundwater merely by "inadvertence" is particularly strong in light of the importance of groundwater. In 1947, just four years before the Compact was approved, Wyoming adopted its first comprehensive

statute regulating groundwater.[4] In these circumstances, the notion that the drafters intended to cover groundwater but inadvertently failed to include it in their list of covered waters is implausible.

Moreover, unlike Wyoming, Montana law at the time the Compact was adopted did not extend the doctrine of appropriation—which Article V.A of the Compact references as governing pre-1950 water rights—to groundwater. *See Ryan v. Quinlan*, 124 P. 512, 515-16 (Mont. 1912) ("It has been settled by a long line of decisions that percolating water is not governed by the same rules that are applied to running streams. . . . [T]he proprietor of the soil, where such water is found, has the right to control and use it as he pleases for the purpose of improving his own land, though his use or control may incidentally injure an adjoining proprietor."). *See also* R.C.M. 1947, c. 29, § 89-2901 (confirming right of landowner to sink wells). The differences between Wyoming and Montana law concerning groundwater regulation make it all the more unlikely that the drafters intended by their silence to somehow cover groundwater uses. That is particularly true given that all of the express terms of the Compact are limited to surface water.

Moreover, as noted, Article V preserves pre-1950 "appropriative rights" and allocates "unappropriated" water under the doctrine of "appropriation." *See* Part III *infra*. While the Compact does not explicitly define "appropriation" or "appropriative

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[4] 1947 Wyo. Sess. Laws ch. 107, discussed in Lawrence J. Wolfe & Jennifer G. Hager, *Wyoming's Groundwater Laws: Quantity and Quality Regulation*, 24 Land & Water L. Rev. 39, 43-45 (1989).

rights," another provision indicates that it refers to use of surface water. Article VII.C states that appropriations may be adjudicated "in the State in which the water is diverted," thereby making it clear that appropriations occur only when water is "diverted."

The Compact expressly defines "Divert" and "Diversion" as limited to surface waters. These terms are defined to mean "the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not *returned directly into the channel of the Yellowstone River or of the tributary from which it is it taken.*" Art. II.G (emphasis added). The taking of groundwater cannot be a "diversion"—and thus is not an "appropriation" or the exercise of an "appropriative right" under Articles V.A and V.B—because it does not involve taking water from *the channel* "of the Yellowstone River" or "of [a] tributary."

The Compact's system for allocation of post-1950 water confirms that the Compact does not reach groundwater. Article V.C provides that the quantity of water subject to the percentage allocations consists of the "total diversions, in acre-feet, above the point of measurement," plus net changes in storage and the water that passed the point of measurement. Moreover, Article V.B makes clear these allocations apply only to "waters of the Interstate tributaries," which are defined in Article II.F to include only certain enumerated rivers. Thus, on its face, the provision regarding allocation addresses surface waters only. As pointed out, the Compact defines "diversions" as a taking from the "channel." Art. II.G. And "diversions . . . above the

point of measurement" also is a clear reference to diversions from the river channel.[5]

In sum, the text of the Compact makes clear that the drafters were concerned solely with allocating the surface waters of the Interstate Tributaries of the Yellowstone River System.

B. The Precedents On Which Montana Relies Involved Compacts That Differ Significantly From The Yellowstone River Compact.

1. Republican River Compact.

Montana relies primarily on this Court's order denying Nebraska's motion to dismiss a complaint filed by Kansas alleging that Nebraska allowed groundwater pumping in the Republican River Basin in violation of the Republican River Compact. *Kansas v. Nebraska*, 530 U.S. 1272 (2000). The Court in that case did not articulate a reason for its decision denying the motion to dismiss, and thus the decision presumably relied on the Special Master's recommendation. That recommendation was based

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[5] Montana's legislation implementing the Compact requires any person claiming a post-1950 "appropriative right" to use waters of an interstate Yellowstone tributary, before diverting any water, to "install in his ditch or other means of diversion a weir or other measuring device." Mont. Code Ann. §85-20-105 (2007). Ditches are surface features, and a weir is a surface measuring device. This provision was passed to provide for "Administration of the Yellowstone River Compact." 1953 Mont. Laws 173. Had the drafters thought the Compact dealt with groundwater, they probably would have also required the measurement of pumped groundwater through a gauge on the pump. The statute's failure to mention any specific measuring device associated with groundwater confirms that the Compact was addressed to surface water.

on language of the Republican River Compact that does not appear in the Yellowstone River Compact.

Specifically, the Republican River Compact defined the "virgin water supply"—which is what that Compact allocated—as "the water supply within the Basin *undepleted by the activities of man*." Art. II, 57 Stat. 86, 87 (1943) (emphasis added). The Special Master viewed this language as crucial:

> To be noted first is the unqualified inclusiveness of the language defining what the Compact regulates: the "water supply within the Basin," not some of it, but all of it. And the water supply that is regulated is the "virgin" supply; that is, the full quantity of water in its natural state, "undepleted by the activities of man."

First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), *Kansas v. Nebraska and Colorado*, No. 126, Orig., at 19-20 (Jan. 28, 2000). The Special Master explained further: "Any groundwater pumping that depletes the stream flow is an 'activity of man' by which the virgin water supply of the Basin is beneficially consumed, and therefore the depletion caused by that groundwater pumping must be reflected in the measurements of the virgin water supply and of consumptive use." *Id.* at 20-21.

By contrast, the Yellowstone River Compact contains no such broad requirement to allocate a "virgin" water supply within the Basin "undepleted by the activities of man." Rather than announcing as its purpose "the most efficient use of the waters of the [ ] River Basin," Republican River Compact, Art. I, 57 Stat. 86, the Yellowstone River Compact

explains that the signatory States adopted the Compact to "remove all causes of present and future controversy . . . with respect to the waters of the Yellowstone River and its tributaries . . .." Compl. App. A-1. As for the waters it actually allocates among the States, the Yellowstone River Compact is limited to the "unused and unappropriated waters of the Interstate tributaries of the Yellowstone River." Art. V.B. Thus, unlike Republican River Compact, the Yellowstone River Compact contains no definition of "water supply," and instead defines only the "Yellowstone River System" and "Interstate Tributaries" (and does so in terms expressly limited to surface waters). Nor does it contain any other provision forbidding activities that might deplete surface water in some other manner. While the Compact defines "beneficial use" as use of the water supply that depletes it (Art. II.H), the Compact regulates only "direct diversions for beneficial use."[6]

Moreover, the Republican River Compact allocated specific amounts of water, expressed in acre-feet for each affected drainage basin, with a special provision for increasing or decreasing allocations where future supply deviated from these amounts. Republican River Compact, Arts. III and IV, 57 Stat. 87-89. Allocations of specific quantities

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[6] Art. V.B. Article V.A. on which Montana relies, applies to "[a]ppropriative rights to beneficial uses," but only "of the Yellowstone River System," which is expressly defined in terms limited to surface water (*i.e.*, "the Yellowstone River and all of its tributaries, including springs and swamps"). As discussed above, the Compact describes "appropriation" as diversion from the river channel. *See* Arts. VII.C (appropriations adjudicated where "the water is diverted"), II.G ("diversion" involves taking of water from "the channel" of the Yellowstone River or of its tributaries).

are not even mentioned in the Yellowstone River Compact.

Also, the Special Master's Report on the Republican River Compact, while concluding that the Compact's language unambiguously covered groundwater, found that "if the language of the Compact were thought to be ambiguous, extrinsic evidence of the parties' intent leads clearly to the same conclusion." First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), *Kansas v. Nebraska and Colorado*, No. 126, Orig., at 23. Specifically, the Special Master found that:

> [D]ocuments from the negotiation and drafting of the Compact demonstrate that the Commissioners who represented the compacting States were well aware (1) that groundwater diversion prior to its entrance into the stream flow can have the effect of depleting the virgin water supply and (2) that groundwater contributions to the virgin water supply would be allocated under the Compact.

Id. at 25. Montana, which has the burden of proof on the issue,[7] has not alleged that such evidence exists in this case. And the documents relating to the history of Compact negotiations and passage by the States and Congress (discussed in Part III *infra*) contain no reference to groundwater pumping or other concerns about depleting the water supply, other than by direct diversion of surface water.

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[7] *Kansas v. Colorado* ("*Kansas I*"), 514 U.S. 673, 693-94 (1995).

2. Arkansas River Compact

Montana also cites this Court's agreement with the Special Master's conclusion that the Arkansas River Compact was violated by "'[post-Compact] pumping in Colorado [that] caused material depletions of the usable Stateline flows of the Arkansas River.'" *Kansas I*, 514 U.S. at 693-94 (quoting Report of the Special Master at 263) (first alteration in text). However, the Arkansas River Compact contained a broad provision, Article IV.D, that the "waters of the Arkansas River . . . shall not be materially depleted in usable quantity or availability for use . . ." by future development or construction for purposes of water utilization and control. Art. IV.D, 63 Stat. 145, 147 (1949). The Special Master interpreted that provision to "protect . . . usable flows from material depletion caused by any increased consumptive use, including the construction of new wells or increased levels of pumping from precompact wells." Report of the Special Master, *Kansas v. Colorado*, No. 105, Orig., 1994 WL 16189353, at *45 (Oct. 3, 1994). This Court agreed, and relied on "the clear language of Article IV-D" to hold that Colorado's post-Compact pumping violated the Compact. *Kansas I*, 514 U.S. at 690-91. *See also Kansas v. Colorado ("Kansas II")*, 543 U.S. 86, 90-91 (2004). There is no comparable provision in the Yellowstone River Compact.

II. IN ALL EVENTS, THE COMPACT DOES NOT COVER GROUNDWATER THAT WOULD NOT NATURALLY REACH THE SURFACE SO AS TO AFFECT RIVER FLOW IN MONTANA.

The Complaint specifically targets groundwater use for irrigation and CBNG extraction. For the

reasons discussed above, we agree with Wyoming that neither type of groundwater use is covered by the Compact. Moreover, there is an additional reason to conclude that the Compact does not cover groundwater use for CBNG extraction where the groundwater would not naturally reach the surface so as to affect river flow in Montana.

As previously described, the Yellowstone River Compact defines "Tributary" as any stream that "contributes to the flow" of the Yellowstone River. Art. II.E. The Compact also defines the "Yellowstone River System" to mean the Yellowstone River and "all of its tributaries, including springs and swamps." Art. II.D. Springs and swamps, which are surface waters themselves, are apparently included because they contribute to the flow of the surface streams. And, as previously noted, the Compact applies to "appropriative rights" and "appropriations" that involve "diversion" from the channel of the river or of a tributary. Arts. V.A, V.B, II.G.

The argument might be made that "diversion" from a channel is involved when a person takes groundwater that would otherwise flow into the river stream. That argument was an important factor in *Kansas v. Nebraska*, where the Special Master concluded that "the Compact negotiators intended the Compact to regulate all the natural stream flow in the Basin, *including any groundwater contributions to that flow*." First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), *Kansas v. Nebraska and Colorado*, No. 126, Orig., at 25 (emphasis added). We think that argument would be unsupported by the language of the Yellowstone River Compact because, as previously discussed, the Compact is limited to surface water

and differs markedly from the compact at issue in *Kansas v. Nebraska*.[8]

But even if such a broad reading of "diversion" were accepted, it would not cover water produced in association with CBNG. As previously described, typically water pumped during CBNG extraction would not naturally reach the surface of the Powder River in Montana, and thus would not affect Montana's rights under the Compact. *See N. Plains Res. Council*, 325 F.3d at 1158. Even a broad concept of "diversion" would not reach the CBNG operator pumping underground water that otherwise would not reach the river and be available in Montana for diversion.[9]

The conclusion that the Compact does not cover diversion of groundwater that would not naturally reach the river as it flows into Montana is confirmed by the Compact's definition of "beneficial use." (As previously noted, Article V.A, on which Montana relies, applies to pre-1950 "[a]ppropriative rights to the beneficial uses" of the waters of the Yellowstone River system.) "Beneficial Use" is defined as "that use by which *the water supply of a drainage basin* is depleted when *usefully employed* by the activities of

[8] Also, Article V.B regulates "direct diversions for beneficial use." Pumping groundwater that otherwise might eventually reach the stream is not a "direct diversion." Moreover, as previously noted, Article II.G defines diversion as taking water from the channel. Taking water than might eventually reach the channel is not the same thing as taking water from the channel.

[9] Indeed, to the extent that CBM pumping brings water to the surface that would not otherwise be available to Montana for diversion, Montana has no standing to complain under the Compact that it is being deprived of a sufficient river flow.

man." Art. II.H (emphasis added). The "drainage basin" is the Yellowstone River Basin, which the Compact defines as areas "drained by the Yellowstone River and its tributaries." Art. II.C. CBNG groundwater is not "drained by the Yellowstone River and its tributaries," if it "comes from deep underground aquifers [and] would not reach the ... river" if it were not extracted by the CBNG process. *N. Plains Res. Council*, 325 F.3d at 1158. And if the groundwater would not naturally reach the surface so as to affect river flow in Montana, Montana has no basis for claiming that its rights under the Compact have been violated by the process. Any other interpretation would be divorced from the purpose of the Compact to protect flows of surface water to Montana and North Dakota.

III. THE COMPACT DOES NOT CONFER ADDITIONAL PROTECTION ON PRE-1950 WATER RIGHTS.

Montana's claims would fail even if the Compact were read, notwithstanding its plain language to the contrary, to somehow cover all waters underlying the surface area of the Tongue and Powder River Basins. Montana's claims are premised on the notion that Article V.A of the Compact confers additional protection on pre-1950 rights against post-1950 uses, above and beyond the protection available under existing law. The plain language of Article V.A, however, confirms what the history (as discussed in Wyoming's brief) reveals. The drafters of the Compact assumed that there would be ample water to satisfy pre-1950 uses, and wrote the Compact to allocate the water they assumed would remain after pre-1950 uses were satisfied. By its terms, the Compact leaves the holders of pre-1950 rights to the status they enjoyed under prior law. The Compact's

effect is limited to allocation of the remaining waters among post-1950 rights and supplemental supplies for pre-1950 rights.

The language of Article V.A makes plain that pre-1950 rights would continue to be enjoyed under the existing law of appropriation, rather than acquiring new rights under the Compact: "Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Art. V.A. This provision clarifies that each State's pre-1950 rights to use the water of the Yellowstone River System "shall continue to be enjoyed" and is therefore not affected by the proportional appropriations of the "unused and unappropriated waters" of the river system provided for in Articles V.B and V.C. Article V.A itself does not guarantee that those pre-1950 rights will be satisfied, does not allocate any water to satisfy those rights, and does not provide any remedy in the event there is insufficient water to satisfy those rights.

Article V.A's language dealing with pre-1950 water rights stands in stark contrast to the language the drafters adopted in Articles V.B and V.C for the "unused and unappropriated" waters of the Yellowstone River System. There, the Compact does not merely recognize the State's rights to use those waters, it affirmatively allocates water between the States to be used for those purposes and provides for means of ensuring compliance with the Compact's allocation of those waters. *See* Art. V.B (providing that "the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, . . . is allocated to each signatory

State" as provided); Art. V.C (providing that "[t]he quantity of water subject to the percentage allocations" of the Compact "shall be determined on an annual water year basis" pursuant to a specified formula). If the drafters had wanted to guarantee satisfaction of pre-1950 water rights or allocate waters for that purpose, they would have done so expressly. Montana has not alleged that Wyoming has used more than its proportional share of the waters actually allocated by the Compact in Articles V.B and V.C. It has therefore failed to state a claim upon which relief can be granted.

That the plain language of Article V.A does not guarantee adequate water to satisfy pre-1950 water rights is confirmed by the history of the Compact. The Senate Report on the final Compact included and relied upon the report to Congress of R.J. Newell, the United States' representative to the Yellowstone River Compact negotiations. Wyo. Mot. to Dismiss, App. 78. In explaining the negotiating and drafting history over many years that led to the final Compact presented to Congress, the Newell Report stated:

> In earlier attempts to arrive at a compact and in the early meetings here reported, there was searching discussion as to whether the agreement sought on division of waters should include the water now appropriated and in use or should apply only to the unappropriated and unused balance which is available for further development. *The latter principle was decided on (art. V-A)* for several reasons. First, it would be a huge and time-consuming task to determine and

> fix comparable values for existing rights in three States with differing water laws and practices in establishing water rights. Second, the basic fact that there is enough water if properly conserved by storage to take care of all existing and all feasible future developments points up the importance of arriving promptly at the simplest workable agreement that would permit such storage projects to proceed.

Wyo. Mot. to Dismiss, App. 83 (emphasis added). The United States' representative to the Compact negotiations therefore affirmed in his report to Congress that Article V.A reflects a decision by the drafters that "the agreement sought on division of waters . . . *appl[ies] only* to the unappropriated and unused balance" of the waters, not to "the water now [*i.e.*, in 1950] appropriated and in use" by the signatory States. *Id.* (emphasis added). This report was relied upon and reprinted in the Senate report recommending ratification of the Compact.

In its report, the Senate Committee on Interior and Insular Affairs agreed with the Newell Report's assessment of Article V.A. It explained that under Article V.A, "[e]xisting appropriative rights as of January 1, 1950, are recognized in each of the signatory States," but that *"[n]o regulation of the supply is mentioned for the satisfaction of those rights."* Wyo. Mot. to Dismiss, App. 77 (emphasis added).

The House Report on the Compact reflects this same understanding. It explains that "[e]xtensive studies by an engineering committee, appointed by the commission to advise it, disclosed that little

could be gained, from a water-supply standpoint by attempting, in the compact, the regulation and administration of existing appropriative rights in the signatory States." Wyo. Mot. to Dismiss, App. 71. "Accordingly," the House Report continues:

> paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Id. Thus, the House Report also confirms that while Article V.A "recognizes" pre-1950 water rights and "permits" the continued enjoyment of those rights, it does not "attempt[] . . . the regulation and administration" of those rights. *Id.*

The text and history of Article V.A therefore make clear that the Compact does not provide enforceable rights to or otherwise guarantee the satisfaction of pre-1950 water rights. The drafters of the Compact assumed that, with the construction of proper storage facilities, there would always be adequate water in the Yellowstone River System to satisfy pre-1950 water rights, and still have an adequate remainder of unused and unappropriated waters to provide for foreseeable future beneficial uses. Because of that assumption, and because all parties concerned were principally motivated by the need to complete the various water storage projects then-envisioned, the drafters elected to omit from the Compact any express guarantee, regulation, or

appropriation of water with regard to pre-1950 water rights, and provided solely for the allocation of waters "unused and unappropriated" at that time. Art. V.B.

In 1949, Texas and New Mexico signed a Compact for the Pecos River that contained a clause Montana now wants the Court to read into the Yellowstone River Compact. The Pecos River Compact provided that "New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." *Texas v. New Mexico*, 462 U.S. 554, 559 (1983). The Court explained the background of this provision: "the Pecos barely supports a level of development reached in the first third of this century." *Id.* at 557. Thus, "[i]f development in New Mexico were not restricted, especially the groundwater pumping near Roswell, no water at all might reach Texas in many years." *Id.*

By contrast, the drafters of the Yellowstone River Compact, signed just two years later, thought there was ample water to support continued development in Wyoming and Montana. Thus, they did not include a "no depletion at the state line" clause, as was used in the Pecos River Compact.

If in fact, as Montana alleges, the assumption about the adequacy of the Yellowstone River System to satisfy pre-1950 water rights and provide for the allocation of other waters specified in the Compact is no longer accurate—if, in short, the Yellowstone River Basin has reached the point the Pecos River apparently reached 60 years ago—the proper response is to return to negotiations to provide for a

mutually acceptable allocation for those rights in light of the changed circumstances. Instead, Montana asks this Court now to read into the Compact a guarantee that is nowhere present in the language of the Compact and that the history of the Compact makes clear the drafters never envisioned. *See, e.g., Kansas v. Colorado*, 533 U.S. 1, 20 (2001) ("*A compact is a contract.* . . . '[It] must be *construed* and *applied in accordance* with its terms.'") (quoting *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)) (emphasis in text); *Arizona v. California*, 373 U.S. 546, 565 (1963) (holding that "courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress"). In all events, Montana's Bill of Complaint should be dismissed.

CONCLUSION

This Court should grant the State of Wyoming's Motion to Dismiss the Bill of Complaint.

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In The Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

On Motion To Dismiss Bill Of Complaint

MONTANA'S BRIEF IN RESPONSE TO WYOMING'S MOTION TO DISMISS BILL OF COMPLAINT

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QUESTION PRESENTED

Does Montana have a cause of action under the Yellowstone River Compact when Wyoming refuses to curtail its post-Compact depletions despite a call from Montana that such uses are preventing satisfaction of Montana's protected beneficial uses under the Compact, Art. V?

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JEROME C. MUYS, INTERSTATE WATER COMPACTS. THE INTERSTATE COMPACT AND FEDERAL-INTERSTATE COMPACT 12 (National Water Comm'n 1971) 29

Robert E. Beck & Amy K. Kelley, eds., 1 WATERS AND WATER RIGHTS § 8.02(c) (2007) 30, 37, 47

Samuel C. Wiel, *Need of Unified Law for Surface and Underground Water*, 2 S. Cal. L. Rev. 358 (1921) 51

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I. STATEMENT

A. Introduction

The Court has agreed to hear Montana's Bill of Complaint, which seeks the Court's interpretation and enforcement of the Yellowstone River Compact. Montana alleges that Wyoming is violating the Compact by depleting the Tongue and Powder Rivers of the Yellowstone River system of water to which Montana is legally entitled under the Compact.

Wyoming has filed a Motion to Dismiss, urging that none of the means by which Wyoming is depleting the Yellowstone River system waters can be the basis of a claim. Wyoming asserts that the "Compact does not restrict Wyoming's depletions of the total annual water supply in a basin." Wyoming Motion to Dismiss 63 ("Wyo. Br."). Montana asserts that the Compact is a full equitable apportionment of the Yellowstone River Basin and that the means of diversion, depletion, and use are not relevant to the inquiry. Montana asserts that any material depletion of the supplies apportioned to Montana when Montana uses are unsatisfied is actionable.

B. The Yellowstone River Basin

The Yellowstone River Basin is described generally in Montana's Brief in Support of Motion for Leave to File Bill of Complaint Br. Supp. Compl. at 3-5. Maps of the area are appended thereto. The Basin consists of the Yellowstone River and its tributaries, including the Tongue River and the Powder River

which originate in Wyoming and flow into the Yellowstone River in Montana. Irrigation is the primary water use of the interstate tributaries in both States. The drainage area of the Yellowstone River comprises over 70,000 square miles, of which roughly 1,500,000 acres were being irrigated when the Compact was adopted in 1951. This irrigated land was fairly equally divided between Montana and Wyoming, with less than two percent (2%) in North Dakota. Senate Report No. 883 [hereinafter "Sen. Rep."], reprinted as Appendix A to this Brief at 10a.

C. The Yellowstone River Compact

Wyoming includes more than twenty (20) pages of compact history in its Motion to Dismiss Montana's Bill of Complaint, much of which is argumentative and not germane to the question presented. See Wyoming's Motion to Dismiss Bill of Complaint 12-35 [hereinafter Wyo. Br.]. The following history is pertinent to the Court's consideration of the issue.

1. A Brief History of Compact Negotiations

The Compact of 1951 was the culmination of almost twenty years of negotiations. Congress passed its first authorization for the States to enter into such an agreement in 1932. See *Act Granting the Consent of Congress to the States of Montana and Wyoming to Negotiate and Enter Into a Compact Agreement for Division of the Waters of the Yellowstone River*, 47 Stat. 306 (1932).

The first Compact was signed in February 1935. It concerned only the States of Montana and Wyoming, and was never acted upon by the legislatures. The second Compact was negotiated in 1942 and went to the legislatures of Montana, Wyoming, and North Dakota in 1943. The Wyoming legislature was the first to take action on this compact and failed to ratify it. A third Compact, similar in form to the previous Compact, was negotiated in 1944, and reached the Legislatures of Montana, Wyoming, and North Dakota in 1945. This Compact was ratified by North Dakota, Montana, and Wyoming, but was vetoed by the Governor of Wyoming. The Compact of 1951 was the fourth Compact to be negotiated between Montana and Wyoming, and was finally approved by all three States and Congress in 1951. Sen. Rep. App. A at 10a; 65 Stat. 663 (1951).

A primary motivation for the Compact was the desire for water storage development. See 82d Congress, House of Representatives Report No. 1118 [hereinafter "House Rep."] reprinted as Appendix B to this Brief, at 12b ("It long has been recognized that the maximum beneficial use of the water resources of the Yellowstone River Basin contemplated in Senate Document No. 191 [Pick-Sloan Plan for Missouri River Basin] is dependent entirely upon the construction and operation of storage reservoirs to regulate and conserve the water yields of the principal streams of the basin."). The Yellowstone Basin was the subject of study for water storage projects, but the United States made it clear that no federal projects

would be built until Wyoming and Montana came to an agreement about the allocation of interstate waters: "The compelling reason for the negotiation of a compact was the need for agreement on division of waters of interstate tributaries in the Yellowstone River Basin that would allow further development to go forward." Sen. Rep. App. A at 14a.

Complicating this task was the lack of accurate water rights data reflecting actual uses in either State. At the time, Wyoming had a centralized system of permit filings that did not reflect actual uses, whereas Montana had no centralized system, but instead relied on actual uses, as well as county filings and court decrees. See October 10, 1940 Minutes of Yellowstone River Compact Commission, reprinted as 1940 Yellowstone River Compact Comm'n Mins. Appendix C to this Brief at 7c-12c. These uncertainties plagued the work of the Yellowstone Compact Commission throughout the process. Early drafts of the Compact attempted to allocate to each State a percentage of the total water, with each State then dividing its percentage share among its users on the basis of state law. But without accurate data regarding existing uses, neither State was confident that its percentage allocation was equitable or adequate to meet existing needs. Both States agreed, however, that existing rights needed to be recognized in the Compact. Sen. Rep. App. A at 15a.

Recognizing the urgency of an agreement on division of waters to allow further development for storage (Sen. Rep. App. A at 15a), the Commission

ultimately abandoned its effort to allocate all water by percentages among the States, and instead chose a different model. That model, as reflected in Article V, distinctly recognizes existing rights without quantification, reserves a "preferential" place for supplemental water supplies to existing acreage, and allocates by percentages only the remainder to serve future water uses.

In its final report to the Senate, the Committee on Interior and Insular Affairs observed:

> "The compact appears to be fair and equitable in apportioning the use of water of the Yellowstone Basin, as defined. The compact provisions are easily administered, and require no elaborate organization. In all respects, it presents an unusually practicable solution to the problems which, during the early years of negotiation, seemed highly complicated and difficult. *Id.* at 2a.

2. The Article V Apportionment

The Yellowstone River Compact of 1951 equitably divides and apportions the water of the Yellowstone River Basin among the States of Montana, North Dakota, and Wyoming. It begins by declaring the intent of the signatory States "to remove all causes of present and future controversy" between the States "with respect to the waters of the Yellowstone River and its tributaries." The Compact further articulates the States' desire "to provide for an equitable division and apportionment of such waters," and declares that

they "have resolved to conclude a Compact . . . for attainment of these purposes." 65 Stat. 663; Appendix to Montana's Bill of Complaint (hereinafter App. to Compl.) at A-1, A-2.

The apportionment provisions of the Compact appear in Article V: "The apportionment, or division, of the waters of the basin is provided in article V, subsections A, B and D." Sen. Rep. App. A at 3a. Article V.A declares:

> "Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." App. to Compl. at A-8.

Article V.B then allocates the "unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950." The first clause of V.B allocates to each State "such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." The second clause of Article V.B allocates by percentages the remainder of the unused and unappropriated water, i.e., whatever is left after V.A pre-Compact rights and V.B supplemental rights are satisfied, for "storage or

direct diversions for beneficial use on new lands or for other purposes." *Id.* at A-8, A-9.

Article V.C sets forth the algebraic formula whereby the parties' uses of "unused and unappropriated" water allocated by percentage are to be measured. *Id.* at A-9, A-10. Article V.D recognizes existing rights to the beneficial uses of waters of the Yellowstone River as between Montana and North Dakota, and sets forth the method for allocation during the irrigation season. *Id.* at A-10, A-11. Article V.E excludes from the Compact domestic and stock water uses, as well as devices and facilities for the control and regulation of surface waters. *Id.* at A-11. Article V.F requires the Commission to reexamine the allocations made and, upon unanimous agreement, recommend modifications therein as are fair, just, and equitable. *Ibid.*

Viewed as a whole, Article V articulates a comprehensive scheme for the apportionment of all water in the basin on the basis of a three-tiered model: (1) existing beneficial uses; (2) supplemental supplies for the rights protected in Article V.A; and (3) new uses. Under this model, pre-Compact rights in all three States take first priority, and are apportioned under the Compact in whatever amounts were then being put to beneficial use. Any unused and unappropriated water left over after pre-Compact rights are satisfied may then first be used to supplement those rights protected in Article V.A. Thereafter, any remaining water is subject to a percentage allocation as between Wyoming and Montana.

D. Montana's Bill of Complaint and Wyoming's Motion to Dismiss

Montana submitted its Motion for Leave to File a Bill of Complaint against Wyoming and North Dakota in January 2007.[1] The Bill of Complaint generally alleges that Wyoming has violated Article V of the Yellowstone River Compact. More specifically, Wyoming is alleged to have violated Article V by refusing to curtail its consumption of water for post-Compact uses when such consumption depletes Montana's apportioned share of the interstate waters. (Compl. ¶¶ 8-12). In response to this Court's invitation, the Solicitor General filed a brief recommending the Court grant Montana's motion and allow Wyoming to submit a motion in the nature of a Rule 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure. This Court granted Montana's Motion for Leave to File on February 19, 2008, and granted Wyoming leave to file the suggested motion. *Montana v. Wyoming & North Dakota*, 128 S. Ct. 1332 (2008). Wyoming filed its Motion to Dismiss on April 4, 2008. Anadarko Petroleum Corporation filed a Motion for Leave to File Amicus Brief and Amicus Brief in Support of Wyoming on April 25, 2008.

The first thirty-five pages of Wyoming's Brief presents a "*Statement of Facts Material to the Question*

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[1] Montana named North Dakota because it is a party in the Compact, but sought no relief against that State. North Dakota has not filed an appearance herein.

Presented." Appended to the Brief are numerous excerpts from pre-Compact correspondence and reports, as well as post-Compact documents.[5] As it did in its Brief in Opposition to Motion for Leave to File (Wyo. Br. Opp.), Wyoming asserts that Montana fails to state a claim upon which relief can be granted. Compare Wyo. Br. Opp. 15-17, with Wyo. Br. 59-64 (groundwater); Wyo. Br. Opp. 17-20, with Wyo. Br. 55-58 (increased consumption); Wyo. Br. Opp. 20-23, with Wyo. Br. 50-54 (storage); and Wyo. Br. Opp. 23-28, with Wyo. Br. 54-55 (increased acreage).

The essence of Wyoming's argument is that "[t]he Compact does not restrict Wyoming's depletion of the total annual water supply in a basin." Wyo. Br. 63. In Wyoming's view, Montana has not alleged any cognizable injury from Wyoming's use of water because none of the alleged violations (construction of new storage reservoirs, irrigation of new acreage, increased consumption on existing acreage, and groundwater depletions) constitute a violation of the Compact. *Id.* at 63. According to Wyoming, "claims based on depletion or consumption must be dismissed." *Id.* at 3.

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[5] Not all of the documents contained in Wyoming's Appendix were cited in its Brief. See Wyo. Br. at App. 21, 31, and 34 (documents not cited).

II. SUMMARY OF ARGUMENT

Montana brought this original action seeking interpretation and enforcement of the Yellowstone River Compact. Montana has alleged that Wyoming has refused to curtail its post-Compact depletions when they interfere with Montana's Article V rights. Wyoming has filed a Motion to Dismiss, arguing that Montana's bill of complaint states no cause of action under any facts. For determining this motion, assumed to be Montana's allegations in the bill of complaint are true. Therefore, the question before the Court now is whether Montana has a cause of action when Wyoming refuses to curtail its post-Compact depletions despite a call from Montana that such uses are preventing satisfaction of Montana's protected beneficial uses under the Compact, Article V.

Wyoming's understanding of the Compact is fundamentally at odds with that of Montana. On the basis of the Compact language itself, as well as official legislative history, Montana understands the Compact to fully and equitably apportion the total water supply of the Yellowstone River Basin, as defined. When one State takes too much water without regard to satisfaction of downstream requirements, it commits a Compact violation, because the downstream State is deprived of its share to the same degree. There is no water unaccounted for.

The Compact sets up a three-tiered priority of uses – existing uses, supplemental uses, and new uses – for the privilege and protection of all three

States. These three tiers are more broadly defined as either pre-Compact or post-Compact uses. Wyoming violates the Compact whenever its post-Compact uses deplete the supply below that needed to satisfy Montana's apportioned share, including pre-Compact uses.

Wyoming ignores its obligations under the Compact. On the basis of extrinsic evidence, and without explaining the plain text of the Compact itself, Wyoming argues that its methods of depletion are not addressed in the Compact and therefore cannot be a basis for a Compact violation. Whatever that method may be, depletion of waters apportioned to another State constitutes a violation of the Compact, and this Court has recognized a cause of action under such circumstances to address the violation.

This Court has often stated that it is empowered to resolve disputes between States over interstate river compacts. This is such a dispute. Montana has alleged that Wyoming is taking a part of the water to which Montana is entitled under the Yellowstone River Compact. This case fits squarely within the Court's precedents on this subject.

III. ARGUMENT

A. Wyoming's Motion to Dismiss Should Be Denied Because It Does Not Meet Threshold 12(b)(6) Standards.

1. Standard for Motion to Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a claim to be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Thus, Rule 12(b)(6) "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). For that reason, the Court assumes that the factual allegations in the Complaint are true. *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955, 1965 (2007).

In this case, the following factual allegations regarding post-Compact development in Wyoming are assumed to be true:

(1) Wyoming refuses to curtail its consumption of the waters of the Tongue and Powder Rivers (Compl. ¶ 8);

(2) Wyoming has allowed construction and use of new and expanded water storage facilities in the Tongue and Powder River Basins (Compl. ¶ 9);

(3) Wyoming has allowed new acreage to be put under irrigation in the Tongue and Powder River Basins (Compl. ¶ 10);

(4) Wyoming has allowed the construction and use of groundwater wells for irrigation and for other uses and has allowed the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins (Compl. ¶ 11);

(5) Wyoming has allowed the consumption of water on existing irrigated acreage in the Tongue and Powder River Basins to be increased (Compl. ¶ 12);

(6) Wyoming has depleted the waters of the Tongue and Powder Rivers (Compl. ¶ 13);

(7) Wyoming's depletion of the waters of the Tongue and Powder Rivers has caused injury to Montana and its water users (Compl. ¶ 14);

(8) Wyoming has refused Montana's requests to limit its water use (Compl. ¶ 16).

For the purposes of Wyoming's Motion and in accordance with the above rules, the Court should assume that Wyoming has caused Montana injury by depleting the waters of the Tongue and Powder Rivers in the manner specified. The legal question the Court should address is whether these actions violate Article V of the Yellowstone River Compact. Montana's Bill of Complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that [Montana] can prove no set of facts in

support of [its] claim which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); see also, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (Court must construe the Complaint in favor of the Plaintiff).

2. The Court's Standards for Compact Interpretation

This Court has declared in unequivocal terms that it will enforce rights under an interstate river compact:

> "There is no doubt that this Court's jurisdiction to resolve controversies between two States extends to a properly framed suit to apportion the waters of an interstate stream between states through which it flows or to a suit to enforce a prior apportionment. It also extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983) (citations omitted); see also, e.g., *New Jersey v. Delaware*, 552 U.S. ___, 128 S. Ct. 1410 (2008).

In this case, Montana alleges breach of an interstate water compact approved by Congress. See, e.g., Compl. ¶ 18 ("The State of Montana has no sufficient remedy for the aforementioned violations of the Yellowstone River Compact by the State of Wyoming except by invoking the Court's original jurisdiction in this proceeding"). The Compact is both a contract and a federal statute. As a result, the customary rules of

contract interpretation and statutory construction apply. *New Jersey v. Delaware*, 552 U.S. ___, 128 S. Ct. 1410, 1420 (2008) (citing *New Jersey v. New York*, 523 U.S. 767, 811 (1998); *Kansas v. Colorado*, 533 U.S. 1, 20-21 (2000) (O'Connor, J., concurring in part, dissenting in part). If the text of the Compact is unambiguous, it is conclusive. See, e.g., *New Jersey v. New York*, 523 U.S. at 811; *Kansas v. Colorado*, 514 U.S. 673, 690 (1995). If the language of the Compact is ambiguous, other *reliable* indications of the parties' intent are taken into account. See generally, *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.6 (1991) (refusing to give weight to unreliable correspondence). Those sources include materials submitted to Congress in support of its congressional approval, and items in the public record susceptible to judicial notice such as the minutes of the Compact negotiations. See *Oklahoma v. New Mexico*, 501 U.S. at 235 n.5.

A compact represents a bargained-for exchange between its signatories and "remains a legal document that must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). It is a fundamental principle of contract law that the parties to a contract are deemed to have contracted with reference to principles of law, including common law, existing at the time the contract was made. *Kansas v. Colorado*, 533 U.S. at 20. As the Court observed recently in *New Jersey v. Delaware*:

> "Interstate compacts, like treaties, are presumed to be 'the subject to careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purpose of the high contracting parties.'" 552 U.S. ___, 128 S. Ct. at 1423, quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912).

In interpreting the Compact, the Court should attempt to give effect to every clause and every word in accordance with the rules of statutory construction. *New Jersey v. Delaware*, 552 U.S. ___, 128 S. Ct. at 1420-21; *Duncan v. Walker*, 533 U.S. 167, 174 (2001). To this end, it is appropriate to construe a compact term in accordance with its common-law meaning, unless some other meaning is intended. *New Jersey v. Delaware*, 552 U.S. ___, 128 S. Ct. at 1420. Absent a statutory text or structure that would require the Court to depart from the normal rules of statutory construction, the Court should not construe a statute in a manner that is strained and, at the same time, would render a term superfluous. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955).

3. Wyoming Has Not Met Its Burden Under Rule 12(b)(6).

The purpose of a Rule 12(b)(6) motion to dismiss is to streamline a case and allow a court to rule prior to the development of the facts when the Complaint

presents a discrete legal issue. See *Neitzke*, 490 U.S. at 326. To succeed on its Motion, Wyoming must establish "beyond doubt that [Montana] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. at 45-46. As a threshold matter, Wyoming has not met this burden and its Motion to Dismiss should be denied for three reasons: (1) Montana's Complaint does not restrict its claims to Article V.A of the Compact; (2) Wyoming's interpretation of the Compact is incorrect; and (3) Wyoming relies on documents and facts beyond the scope of a Rule 12(b)(6) motion.

(a) Montana States a Claim Under Wyoming's Interpretation of the Compact.

Wyoming concedes that it violates the Compact "if its cumulative post-1950 diversions and nets gains in storage exceed Wyoming's percentage of cumulative divertible flow from October 1 through a given date." Wyo. Br. 37; see also, *id.* at 48 (acknowledging that Wyoming "would be in violation if its cumulative diversions and storage through the given date exceeded its 40% of the cumulative divertible flows on the Tongue, or 42% on the Powder"). Wyoming incorrectly asserts, however, that Montana "does not allege such a violation." *Id.* at 37.

It is central to Montana's Complaint that Wyoming has violated Article V.A of the Compact by using post-Compact water in derogation of Montana's

protected pre-Compact rights, but Montana has also broadly pled violations under Article V generally. Montana has pled the matter broadly because the amendment of pleadings in original actions "does not suit cases within the Court's original jurisdiction." See *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995). Because factual development has not yet occurred in this case, and because in any complete equitable apportionment, a violation of the apportioned supply of one category (pre-Compact rights) necessarily causes a violation of the allotment of post-Compact supply. For that reason, the Complaint does not single out Article V.A or V.B, and instead focuses on Montana's claims for violations of the apportionment in Article V.

Paragraphs 9 through 14 of the Complaint allege that Wyoming depleted the waters allocated to the State of Montana by allowing new and expanded water storage facilities, new acreage to be put under irrigation, expansion of groundwater pumping and increased consumption of water. By Wyoming's own admission, if such actions caused Wyoming's cumulative diversions and storage to exceed its percentage allocations on the Tongue or Powder River, such actions would constitute a violation of Article V of the Compact. Wyo. Br. 48. Because in a 12(b)(6) motion, the Court will assume these allegations to be true, it necessarily follows that the Complaint states a claim upon which relief may be granted, and Wyoming cannot meet its burden on a 12(b)(6) motion.

(b) Wyoming's Interpretation of the Compact Is Incorrect.

Montana seeks a declaration of its rights to the waters of the Tongue and Powder Rivers under the Compact, alleging that Wyoming's actions have depleted the water supply in violation of Montana's rights under Article V. Compl. at 5, ¶ A. Wyoming asserts that these allegations, even if true, do not constitute Compact violations. Wyo. Br. 39. Wyoming's motion thus places before this Court a discrete and controlling question of law that has precipitated this original action. Montana would welcome a resolution of this question of law through the familiar principles of compact construction and pursuant to Rule 12(b)(6). As discussed in detail in Sections III.B.1 to III.B.6 of this brief, Wyoming's Motion to Dismiss should be denied because its interpretation of the Compact is incorrect. See Fed. R. Civ. P. 12(b)(6); Sup. Ct. R. 17.2.

(c) Wyoming Relies on Documents and Facts Beyond the Scope of Rule 12(b)(6).

Wyoming's Motion to Dismiss should also be denied because it improperly relies on documents and alleged facts that are beyond the scope of a Rule 12(b)(6) motion.

Judicial notice of historical documents and public records is proper on a motion to dismiss, but only if those documents are unquestionably reliable. See

Papasan v. Allain, 478 U.S. 265, 268 n.1 (1986) (court may take notice of items in the public record that are not disputed by the parties); accord, Fed. R. Evid. 201 (judicial notice may be taken for facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). Documents contained in Wyoming's Motion to Dismiss do not rise to this unassailable level because they lack a date (Wyo. Br. App. 52-54), lack an identified author (Wyo. Br. App. 40, 58), provide only excerpted portions from a much larger document, (Wyo. Br. App. 7, 9, 12, 16, 20, 21, 22, 26, 28, 31, 33, 34, 37, 40, 41, 45, 47, 58, 49, 65, 66, 69, 75, 87, 88, 90, 91, 93, 94) or are otherwise unverifiable. The documents underscore Wyoming's reliance on disputed factual allegations outside the Complaint.

For example, at various points in its Motion, Wyoming relies on correspondence, post-Compact dealings, or assertions concerning the Compact negotiator's understanding and intent. Thus, rather than present a discrete legal issue as required by Rule 12(b)(6), Wyoming's Motion presents a mixed question of law and fact. If such a motion were presented before a Federal District Court pursuant to the Federal Rules of Civil Procedure, it would be converted to a motion for summary judgment. See Fed. R. Civ. P. 12(b); e.g., *Roberts v. Morton*, 389 F. Supp. 87 (D.C. Colo. 1975), *aff'd*, 549 F.2d 158 (10th Cir. 1976) (motion to dismiss converted to motion for summary judgment where administrative record compiled by Board of Land Appeals of Department of

Interior was relied upon by movant); *Thompson v. Dugan*, 427 F. Supp. 342 (Dist. Pa. 1977) (motion to dismiss converted to motion for summary judgment where movant relied upon certified copies of correspondence with the United States Department of Treasury); 2 A.L.R. Fed. 1027 (citing cases).

In original cases, this Court retains "ultimate responsibility" for both findings of fact and conclusions of law, and it fulfills this obligation with an eye to the long-lasting historical, geographical, and financial ramifications of its decisions. See *United States v. Maine*, 475 U.S. 89, 87 (1986); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984); *Mississippi v. Arkansas*, 415 U.S. 289, 294 (1974). In such cases, the Court has ruled on dispositive motions at an initial stage of litigation only in rare instances where it is apparent that there are no factual disputes. See, e.g., *United States v. Alaska*, 501 U.S. 1248 (1991) (permitting legal issue in original action to be brief based on stipulated facts). In contrast, the Court has taken a cautious approach toward critical public issues where the facts are not clear or are in dispute. As the court has explained:

> [S]ummary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated legislation, contracting and practice.

Kennedy v. Silas Mason Co., 334 U.S. 249, 256-57 (1948); see also, *Eccles v. Peoples Bank*, 333 U.S. 426, 434 (1948) ("Judgments on issues of public moment based on such evidence (affidavits), not subject to probing by judges and opposing counsel, is apt to be treacherous. Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment.").

Where facts are at issue, it has long been recognized that the Court "in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950) (citing cases); see also, *Kansas v. Colorado*, 185 U.S. 125, 147 (1902) ("The general rule is that the truth of material and relevant matters set forth with requisite precision are admitted by demurrer, but in a case of this magnitude, involving questions of so grave and far-reaching importance, it does not seem wise to apply that rule, and we must decline to do so."); *Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995); *United States v. Wyoming*, 331 U.S. 440 (1947); *United States v. Oregon*, 295 U.S. 1 (1935); *United States v. Utah*, 283 U.S. 64 (1931); *Iowa v. Illinois*, 151 U.S. 238, 242 (1894); *Rhode Island v. Massachusetts*, 39 U.S. 210, 257 (1840).

In short, Montana believes that a decision on the discrete legal issue before the Court would advance the litigation. As constructed, however, Wyoming's

Motion to Dismiss improperly relies on documents and factual allegations outside the pleadings. To the extent that Wyoming relies on such documents and disputed facts, its Motion should be denied as beyond the scope of a Rule 12(b)(6) motion and improper for resolution at this stage of the litigation.

B. The Yellowstone River Compact Provides a Cause of Action for Depletion of Waters Apportioned to a Downstream State.

1. The Compact Apportions All Waters of the Yellowstone River Not Expressly Excluded.

The Compact, in its opening language, articulates four motivations of the signatory States: (1) considerations of interstate comity; (2) the desire to remove all causes of present and future controversy; (3) the desire to provide for an equitable division and apportionment; and (4) to encourage beneficial development and use. (App. to Compl. at A-1).

To this end, the drafters set up a three-tiered system of apportionment in Article V: existing uses, supplemental uses, and new uses. Article V.A protects existing beneficial uses first and separately from the rights described in Article V.B clause one (supplemental uses) and V.B clause two (new uses). Article V.A recognizes "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1,

1950)," and declares that such rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." App. to Compl. at A-8. Beneficial uses are defined as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." App. to Compl. at A-5. Article V.B then apportions the "unused and unappropriated waters" of the Interstate tributaries that are not specifically addressed in V.A. *Id.* at A-8, A-9.

Article V is by its own terms, all-inclusive. The only waters excluded from the definition of "Yellowstone River System," and thus from the apportionment provisions of Article V.A, are those in Yellowstone National Park. App. to Compl. at A-4.

Other specific exclusions for de minimis uses or specific methods of water application in other provisions of Article V demonstrate that the drafters understood precisely what was being apportioned and what was not. For example, the Little Bighorn River was excluded from the percentage allocations of Article V.B. *Id.* at A-9. Domestic uses and certain stockwater uses were excluded in Article V.E.1. *Id.* at A-11. Devices and facilities for the control and regulation of surface waters, such as spreader dams and terraces, were excluded in Article V.E.2. *Id.*

Apportioning and allocating the waters of the entire Yellowstone River and its tributaries, subject to the express exclusions, is consistent with the stated intention of the compacting States "to remove all

causes of present and future controversy." *Id.* at A-1. The apportionment and allocation of *all* such waters is also consistent with, and required by, the "desir[e] to provide for an equitable division and apportionment of such waters." *Id.* at A-2. To that end, the States "resolved to conclude a Compact as authorized" by Congress "for the attainment of these purposes." *Id.* at A-1, A-2.

Indeed, Wyoming acknowledges the motivating factor of an equitable apportionment when it states that Montana and Wyoming needed a compact "to establish a practical system to share the interstate tributaries of the Yellowstone in a manner they both considered equitable." Wyo. Br. 8. Contrary to its own admission of the Compact's intent, however, Wyoming narrowly construes Article V as allocating water for new uses only. In Wyoming's view, the only operative or enforceable provision of the Compact is the second clause of Article V.B, as if the water addressed in Article V.A were somehow excluded from the Compact altogether: "Since Montana has not claimed that Wyoming has allowed, or will allow, diverters with post-1950 water rights to exceed the cumulative annual measurements set by the Compact, it has failed to state a claim on which relief can be granted." *Id.* at 3.

Wyoming's argument is unpersuasive for several reasons. First and foremost, it ignores the express purpose of the Compact to effect a complete apportionment of the water in the entire Yellowstone River Basin – not simply to allocate on a percentage basis

the water of four interstate tributaries between Montana and Wyoming. Second, it violates the States' intent to remove "*all* causes of present and future controversy." (Emphasis added.) Indeed, the exclusion of existing uses would have *invited* controversy, not removed it.

Third, a troubling aspect of Wyoming's narrow view of the Compact is its position that Wyoming water users may continue to use pre-Compact rights, without regard to the Compact at all. According to Wyoming, a contrary position would improperly infringe on Wyoming users' continued enjoyment of their rights. Wyo. Br. at 43, 56. Effectively, Wyoming reads Article V to protect only the most upstream state, i.e., Wyoming. Surely, neither of the other downstream States would have acceded to such a lopsided interpretation.

This Court has never held that an interstate compact approved by the legislatures and governors of the respective States and by the Congress and President of the United States has failed to attain its stated purpose. Quite the contrary, the Court has instructed that a compact's purpose is not defeated even when assigned duties are not carried out. See *Green v. Biddle*, 8 Wheat. (14 U.S.) 1, 91 (1823) (construction by which purposes of the Compact would be defeated by refusal to appoint commissioners "is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it."); see also, *Texas v. New Mexico*, in which New Mexico (the upstream state)

unsuccessfully argued that the Pecos River Compact was unenforceable. *Texas v. New Mexico*, 462 U.S. 554, 566-72 and n.17 (1983), citing *Biddle* (rejecting New Mexico's argument that this Court's role was limited to judicial review of official compact commission actions, which New Mexico could prevent from occurring with its veto power on the commission). By the same reasoning, the expressed intentions of the drafters of the Yellowstone River Compact should be enforced.

Wyoming argues that if the drafters had intended to allow a signatory State to make a state line call, they would have included provisions for a state line measuring device. Wyo. Br. 42. The Senate Report indicates Congress did intend a state line call to be the appropriate remedy for excessive depletions by an upstream State. Sen. Rep. App. A at 3a. The drafters also assumed that with the additional storage, no state line call would likely be necessary. (Sen. Rep. App. A at 15a.) The points of measurement for the allocations of unused and unappropriated waters for new uses of Article V.B, ¶¶ 1-4 are at the tributaries' mouth, however, because these measurements took into account not only diverted flow but also return flows and reuses throughout the Basin.

2. Article V.A Apportions the Water Supply in Use at the Time of the Compact.

By apportioning *all* waters of the Yellowstone River and its tributaries, the drafters necessarily

included the water supply in use at the time the Compact was adopted, thus allowing unused water to be stored or otherwise put to beneficial use. The Senate Committee that recommended approval of the Compact listed Article V.A first among the "apportionment" provisions and described that apportionment as follows:

> V-A. Existing appropriative rights as of January 1, 1950, are recognized in each of the signatory States. No regulation of the supply is mentioned for the satisfaction of those rights, and it is clear, then, that a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing. Sen. Rep. App. A at 3a.

As the Senate Committee viewed the Compact, Article V.A apportioned the waters of the basin by recognizing existing appropriative rights in each of the States. Thus, the entire water supply in use at the time of the adoption of the Compact was not excluded from the apportionment effected by the Compact, but, rather, existing uses of the basin water supply were recognized, and protected from "a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion." Sen. Rep. App. A. at 3a.

Wyoming appears to take the opposite view when it states: "Under most compacts, whether based on depletion or divertible flow, water rights established

in each State before the compact is completed are excluded from the allocation. As will be explained below, this is true of the Yellowstone River Compact." Wyo. Br. 11 (citation omitted). In support of its assertion, Wyoming cites JEROME C. MUYS, INTERSTATE WATER COMPACTS. THE INTERSTATE COMPACT AND FEDERAL-INTERSTATE COMPACT 12 and n.22 (National Water Comm'n 1971) [hereinafter Muys Treatise]. This treatise, however, does not support Wyoming's statement. The Muys Treatise, after discussing various methods of apportionment, states: "Whatever the allocation formula, existing uses and/or rights are usually protected." *Id.* at 12.

The fact that the drafters did not quantify existing rights does not mean they are outside the protection of the Compact. As the compact history shows, there are practical reasons why the States and Congress resorted simply to a recognition and protection of existing beneficial uses at the time of the Compact as a matter of principle, as opposed to trying to agree to the specific water rights then in use in each State. In describing Article V.A of the Yellowstone Compact, R.J. Newell, the Federal Representative, in his report to Congress, articulated the reasons for simply affirming in the Compact a *de facto* apportionment of interstate waters among existing uses at the time of the Compact:

> In earlier attempts to arrive at a compact and in the early meetings here reported, there was searching discussion as to whether the agreement sought on divisions of waters

> should include the water now appropriated and in use or should apply only to the unappropriated and unused balance which is available for further development. The latter principle was decided on (art. V-A) for several reasons. First, it would be a huge and time-consuming task to determine and fix comparable values for existing rights in three States with differing water laws and practices in establishing water rights. Second, the basic fact that there is enough water if properly conserved by storage to take care of all existing and all feasible future developments points up the importance of arriving promptly at the simplest workable agreement that would permit such storage projects to proceed. Sen. Rep. App. A at 15a.

In other words, the States and the federal representative to the negotiators, were driven to produce the simplest workable agreement at the earliest possible date to be in a position to take advantage of possible federal projects for improvement of the water supply in the basin, some of which were under consideration as part of the Pick-Sloan Plan. (House Rep. App. B at 10b.) Further, as Newell noted, it was largely the differing specifics of state appropriation law that prevented the parties from agreeing on a quantification of extant rights.[5] To assure that the parties could

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[5] All three States recognized the doctrine of appropriation generally, although each State had its own specific statutory provisions. See Wyo. Br. Opp. at App. A. North Dakota, for its part, also recognized historic riparian rights. See 1 WATERS AND

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come to a timely agreement and thus participate in the federal projects then under consideration, the Compact drafters chose to apportion and protect the existing uses, whatever they were at that time, and to move on to the allocation of the then-unused waters as accomplished in Article V.B.

This approach unburdened the parties from reconciling differing water laws, and based the protection on a snapshot of existing beneficial uses – not specific state water rights. Convinced that with the additional storage, the satisfaction of existing rights would be without controversy, they could avoid the quantification conundrum that had doomed the prior attempts, by protecting prior uses first, and without quantification.

Secretary of the Interior Oscar Chapman offered a similar explanation in a letter incorporated into the Senate Report:

> Extensive studies by an engineering committee, appointed by the commission to advise it, disclosed that little could be gained, from a water supply standpoint, by attempting, in the compact, the regulation and administration of existing appropriate rights in the signatory States. . . . Accordingly, paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of

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WATER RIGHTS § 8.02(c), at 8-38 (Robert E. Beck & Amy K. Kelley, eds. 2007).

> the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation. (Letter from Oscar Chapman, Secretary of the Interior, to Joseph O'Mahoney, Chairman, Committee on Interior and Insular Affairs, Sen. Rep. App. A at 27a).

Article V.A thus has profound significance, which Wyoming entirely ignores. Wyoming offers no explanation of how Article V.A fits into the overall apportionment, or what the drafters meant when they declared that existing rights to beneficial uses "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." It protects those rights under the "doctrine of appropriation," not under the particular laws of the State of Wyoming. As Newell reported, the parties' differing state water laws had largely stymied prior Compact drafts. It is not plausible that, given the differences between Montana's and Wyoming's application of prior appropriation law in their respective states, the drafters would have intended Article V.A to incorporate, *sub silencio*, specific Wyoming state law. And, it is not plausible that Montana would have agreed to such an instrument. See, e.g., *New Jersey v. Delaware*, 552 U.S. ___, 128 S. Ct. at 1422; *Texas v. New Mexico*, 462 U.S. at 570 ("It is difficult to conceive that Texas would trade away its right to seek equitable apportionment in

return for a promise that New Mexico could, for all practical purposes, avoid at will").

It is also important to note that the Compact is focused on preserving and protecting the existing *uses* in each State, as opposed to whatever permits or other paper filings might exist. Article V.A begins with a reference to use: "Appropriative rights to the beneficial uses . . . shall continue to be enjoyed." This focus on "use" is found also in the primary legislative history. The first sentence of the description by the Senate Committee on Interior and Insular Affairs regarding the purpose of the bill also references "use" of water: "The bill would give the consent of Congress to a compact entered into between the States of Montana, North Dakota, and Wyoming providing for an equitable division of the *use* of waters from the Yellowstone River and its tributaries." Sen. Rep. App. A at 2a (emphasis added).

The Senate Committee Report is headed: "Apportionment of *use* of water," and the first sentence of that section states: "The compact appears to be fair and equitable in apportioning the *use* of waters of the Yellowstone Basin, as defined." *Id.* (emphasis added). Throughout the Senate Committee Report, the word "use" appears numerous times. In discussing the comments of the Department of Justice, for instance, the Committee Report states: "Article V-B, it is true, allocates to the States the unused and unappropriated waters, but this follows V-A which recognizes all existing beneficial *uses* as of January 1, 1950." Sen. Rep. App. A at 5a. Thus, the Senate

understood that Article V.A recognizes all existing beneficial *uses*.

Federal representative R.J. Newell, in transmitting his report to the President of the Senate, stated: "I have the honor to enclose a conformed copy of a compact entered into on December 8, 1950, among the States of Montana, North Dakota, and Wyoming to determine the rights and obligations of those States respecting *uses* of the waters of the Yellowstone River and its tributaries." Sen. Rep. App. A at 8a (emphasis added). In the introductory section of his report, he stated, "I believe that the proposed compact is a sound basis for further development in the *use* and control of waters of the Yellowstone River. . . ." *Id.* at 9a. The noted examples of the "use" of water as being the basis of the apportionment in V.A is further supported by the many instances in which the word "use" appears through the Senate Report and the letters incorporated into that report. See Sen. Rep. App. A, passim, as well as the Compact itself, Article V.A.

The report of the House of Representatives Committee on Interior and Insular Affairs, reveals the same focus on the "use" of the waters apportioned by Article V.A and Article V in general. See, e.g., House Rep. App. B at 4b ("Accordingly, paragraph A of Article V recognizes the appropriative rights to the beneficial *uses* of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950 and it permits the continued enjoyment of such rights in accordance with the laws governing the

acquisition and *use* of water under the doctrine of appropriation").

The consistent reference to "use" in the legislative history, and inclusion of that specific term in Article V.A negates any claim by Wyoming that the drafters intended something else, i.e., permitted rights or paper filings, to be protected thereby. (See App. C at 11c-12c. [1940 Yellowstone River Compact Comm'n Mins.].)

3. Article V.B Allocates the Water Supply Not in Use at the Time of the Compact.

The Yellowstone River Compact distinguishes between waters that were being used at the time of the Compact and those that were not. After protecting existing rights to beneficial uses of all water in Article V.A,[4] the drafters proceeded to address the remaining "unused and unappropriated waters of the Interstate tributaries in Article V.B. Within Article V.B, a further distinction is made. Clause 1 addresses supplemental supplies for rights described in Article V.A.[5]

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[4] An appropriative right is limited to the amount actually put to beneficial use rather than the amount claimed on a paper permit. See *Colorado v. New Mexico*, 467 U.S. 310, 323 (1984) (explaining that water rights under the prior appropriation doctrine "depend on actual use").

[5] Supplemental supplies are generally described as the additional water needed to provide a "full service" irrigation supply to acres previously receiving only "partial service," i.e.,

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Clause 2 addresses new uses. Federal Representative R.J. Newell described the priorities within V.B as follows: "[E]xisting irrigation developments with an inadequate supply should have a preferred right to the unused remainder over new projects. The final residue of supply was then divided between the States for further development." Sen. Rep. App. A at 15a; see also, App. to Compl. at A-8, A-9. Because the parties believed that additional storage would make the supply of existing rights easy, the parties characterized V.B as the "core" of the Compact. Sen. Rep. App. A at 27a.

A comprehensive methodology thus emerges from the structure of the Compact itself: pre-Compact rights in all three states take first priority. They are protected in whatever amount was then being put to beneficial use. Anything leftover after pre-1950 rights are satisfied may first be used for supplemental rights described in V.A, and the final remainder is divided by specific percentages for new uses. Wyoming ignores this comprehensive scheme when it asserts that the Compact governs only the remainder of the unused and unappropriated water subject to percentage allocation in V.B, clause 2. Wyoming does not explain how a "remainder" could ever be determined if, in fact, the drafters did not also intend the

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that quantity necessary to fully satisfy the beneficial use. (See generally Sen. Rep. App. A at 3a, noting that existing rights with "deficient" supplies are to be supplemented from V.B waters.)

Compact to establish a baseline of protected supply among the signatory States.

4. Article V.D Completes the Compact Apportionment.

Article V.D is the third apportionment clause of Article V. ("The apportionment or division of the waters of the basin is provided in Article V, subsections A, B and D.) Article V.D focuses on the allocation of remaining waters downstream near the Montana-North Dakota border. It provides: "All existing rights to the beneficial use of waters of the Yellowstone River in the States of Montana and North Dakota, below Intake, Montana, valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact." App. to Compl. at A-10. The House Committee described V.D, saying, *inter alia*, that "paragraph D recognizes all rights in the beneficial use of water than [sic] existed in Montana and North Dakota on January 1, 1950, and that divert below Intake, Mont." House Rep. App. B at 6b.

Article V.D reflects the fact that North Dakota was not solely a prior appropriation State, with respect to water rights, as were Wyoming and Montana. See 1 WATERS AND WATER RIGHTS § 8.02(c), at 8-38 (Robert E. Beck & Amy K. Kelley, eds. 2007) (riparian rights recognized in North Dakota). Since riparian rights are not required to be used in order to be maintained, different language was required in

Article V.D. While everything in Articles V.A and V.B, clause 1, turns on whether the water was used at the time of the Compact or not, riparian rights in North Dakota that may not have been in use at the time of the Compact were nevertheless to be recognized and protected unimpaired by the Compact. Article V.D thus achieved the same purpose of protecting existing rights below Intake, Montana, whether they were appropriative or riparian rights, as Article V.A did in other parts of the basin covered by the Compact.

All of the provisions of Article V are necessarily connected and, in accordance with the general rules of construction, must be given operative effect. *New Jersey v. Delaware*, 552 U.S. ___, 128 S.Ct. at 1420-21. This Court is obligated to construe the Compact as written. *Id.* Read in this way, Article V as a whole accomplishes what all three States intended: to avoid conflict, effect a complete apportionment, respect the rights of each State, and encourage future development. Wyoming's argument to the contrary should be rejected.

5. A State Cannot Lawfully Deplete Waters Apportioned to Another State.

As explained above, the Yellowstone River Compact apportions all of the waters of the Yellowstone River Basin not expressly excluded. Article V specifically recognizes and protects the pre-Compact rights in each State. The States are prohibited from depleting the apportioned pre-Compact water supply in two

ways under the Compact: First, in Article V.A by the directive that such rights "shall continue to be enjoyed;" and second, by the allocation in Article V.B of only the unused and unappropriated waters at the time of the Compact. If, as is claimed in the Bill of Complaint, Wyoming is depleting Montana's pre-Compact water supply by post-Compact uses, Wyoming is violating its allocation under Article V.B. The allocation under Article V.B to Wyoming is only from the waters "unused and unappropriated" at the time of the Compact. If Wyoming's post-Compact uses impair Montana's pre-Compact water supply, Wyoming is exceeding its allocation in V.B and is thereby violating Article V.B.

What are pre-Compact uses protected from? The Senate Committee provides an explicit answer: "It is clear, then, that a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing." Sen. Rep. App. A at 3a. That is, no State may deplete the water supply apportioned to another on the Interstate tributaries. In other words, Montana is not entitled under Article V.A to call upon Wyoming for more water than Montana was using pre-Compact, thus depriving Wyoming's water users of water that they were using to supply their appropriative water rights at the time of the Compact. By the same token, Wyoming and its water users cannot deplete the flows that were being used to supply existing water rights in Montana at the time of the

Compact. That is, Wyoming may not deplete the waters necessary to supply Montana's pre-Compact rights if that water was available to Montana under the state of development existing at the time of the Compact.

The Compact recognizes that the beneficial uses existing at the time of the Compact that are protected by Article V.A involve depletion of the water supply. Article II.H provides: "The term 'Beneficial Use' is herein defined to be that use by which the water supply of a drainage basin is *depleted* when usefully employed by the activities of man." App. to Compl. at A-5 (emphasis added). Thus, the drafters of the Compact recognized the physical reality that the beneficial use of water, especially for the favored beneficial use of irrigation, necessarily involved depletion (consumption) of water in the process of beneficial use. Wyoming's argument that the Compact ignores depletions is contrary to the plain language of Article V.A. See also, Sen. Rep. App. A at 3a acknowledging that the Compact allocations of Article V.B account for return flows, which are the flip side of the consumption/depletion equation.

In sum, the Compact prohibits the consumption and depletion of waters by one State that are apportioned to another State under Article V. Wyoming cannot increase the consumptive use (depletions) associated with its diversions at the time of the Compact if it would decrease the flows on which Montana was depending for its uses at the time of the Compact, thus violating Article V.A. This is true no

matter what the cause of the depletion may be, whether it is new storage or some other new means of depleting the surface flows of the stream, such as groundwater pumping or intensification of consumption on existing acres. If given the opportunity, Montana will prove that such depletions have occurred.

6. The Drafters Utilized the Divertible Flow Principle Only for Measuring the Post-Compact Supply for New Uses.

The divertible flow principle articulated in relation to Article V.B has no bearing upon whether the Compact protects Montana from depletions by post-Compact uses in Wyoming. Taken in context, Newell's comments wholly support Montana's interpretation of the Compact. Divertible flow was only a method for measuring the Article V.B clause 2 allocation. The full Newell report, included in Appendix A, reveals that Wyoming's quoted language on divertible flow relates only to the V.B. clause 2 waters. In that report, Newell explained the Compact's apportionment provisions sequentially: first, the overarching Yellowstone River system apportionment for existing uses without quantification in Article V.A; second, the allocation of the unused and unappropriated waters of the Interstate tributaries for supplemental uses, and lastly, the percentage allocations of supply to be made available for new uses. This last portion only is what is measured by the divertible flow method. Sen. Rep. App. A at 16a.

Wyoming claims that the Compact is a "divertible flow" compact, such that "claims based on depletion or consumption must be dismissed." Wyo. Br. 3. In support, Wyoming cites the R.J. Newell report to Congress. Wyoming's redacted language fails to show, however, that the Newell description of the "divertible flow principle" refers only to Article V.B, ¶ 1-4. Sen. Rep. App. A at 16a. In other words, the percentage allocations of the interstate tributaries in Article V.B were based on percentages of divertible flows, as specifically set out in Article V.C.

As can be seen from Mr. Newell's statement, the "divertible flow" principle is simply a measuring tool. It did not change the theory of the Compact. It did not change the effect of the Compact. It did not change the fundamental principle that all of the waters of the Tongue and Powder Rivers were apportioned and allocated by the Compact and that overuse by one State of its allocation necessarily depletes the waters allocated to another State. Finally, it did not change the principle, established by the Court, that depletion of apportioned waters under an interstate river compact is grounds for a claim in this Court.

Wyoming's view of its right to deplete the supply to the detriment of Montana's pre-Compact beneficial uses writes out of the Compact the V.A protection of the beneficial uses in the signatory States. Montana's pre-1950 rights are thereby protected from any of Wyoming's increases in consumption that deny it the water on which the pre-Compact rights in Montana relied at the time of the Compact.

The drafters and Congress certainly understood and intended to affect the entire hydrology of the basin by adding additional storage facilities. The Engineering Committee had undertaken comprehensive studies of the basin, mapped existing irrigated acres, potential irrigation, good reservoir sites, and had factored the return flows from the new waters that would be added to the system into their overall water balance. See Sen. Rep. App. A at 14a. The O'Mahoney report to Congress notes: "Allocations, thereby, take into account *return flows and uses of them*, as well as original runoff." Sen. Rep. App. A at 3a (emphasis added). Wyoming's picture of a limited agreement intended for new uses only, which ignores depletions and consumption, is entirely contrary to historic evidence and the text of the Compact itself.

C. Wyoming's Post-Compact Increases in Storage in Reservoirs Enlarged or Constructed After January 1, 1950 *Can* Violate the Compact.

Wyoming asserts: "The Compact does not restrict the construction of reservoirs, but instead, encourages it in both States . . . construction of reservoirs is not a Compact violation." Wyo. Br. 50-51. Montana agrees with Wyoming that the Compact encourages storage. It is not the construction of post-Compact storage in Wyoming about which Montana complains, rather, it is the use of that storage capacity to deplete waters apportioned and allocated to Montana under the Compact. See Compl. ¶ 9 ("Since January 1, 1950,

Wyoming has allowed construction and *use* of new and expanded water storage facilities in the Tongue and Powder River Basins, *in violation of Montana's rights* under Article V of the Compact"); cf *Oklahoma v. New Mexico*, 501 U.S. 221, 228-31 (1991) (determining that the Canadian River Compact imposes a limitation on stored water, not physical reservoir capacity).

Wyoming's current argument[6] is, "Reservoir storage could only cause Wyoming to violate the Compact if it caused Wyoming to exceed its *total* cumulative percentage allocation as of a given date. Montana has not alleged that this has ever occurred, or is likely to occur." Wyo. Br. 52 (emphasis in the Wyo. Br.). Montana's claim is that use of post-Compact storage facilities in Wyoming on the Tongue and Powder Rivers is depleting waters that are apportioned to Montana by the Compact. This statement is accepted as true for purposes of considering the Motion to Dismiss. The allegation in paragraph 9 of the Bill of Complaint is broadly phrased in terms of a "violation of Montana's rights under Article V of the Compact," which includes both Article V.A and Article V.B.

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[6] In its Brief in Opposition to Montana's Bill of Complaint, Wyoming suggested that no Compact violation has occurred because "[t]hese reservoirs are located on tributaries to the Tongue and Powder, and not on the main stems of those rivers." (Wyo. Br. in Opp. at 21). Wyoming has apparently abandoned this argument.

Furthermore, Wyoming mistakenly presumes that Article V.B is the only operative Article in the Compact, such that no signatory State has any cause of action based on alleged depletions of water necessary to satisfy pre-Compact uses. This argument also fails because it ignores Wyoming's obligations under Article V.A of the Compact not to deplete Montana's pre-Compact water supply by means of post-Compact development in Wyoming. See ¶ III.B., infra.

D. Wyoming's Post-Compact Increases in Irrigated Acreage *Can* Violate the Compact.

Montana alleges in paragraph 10 of its Bill of Complaint, "Since January 1, 1950, Wyoming has allowed new acreage to be put under irrigation in the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact." Wyoming responds: "In order to successfully allege a Wyoming violation of the compact" in this regard, "Montana must allege a violation of the allocation formula in a particular instance. Montana fails to do so in its complaint." Wyo. Br. 54.

Wyoming's assertion is misguided in two respects. First, as the quotation of paragraph 10 of the Bill of Complaint above shows, Montana pled a violation of Article V by the development of new acreage in Wyoming. Second, any post-Compact use in Wyoming that consumes part of the water supply

for Montana's pre-Compact uses constitutes a violation of Article V.

Irrigation of new acreage will undoubtedly cause additional depletions to the Powder and Tongue Rivers. This is because irrigation is an inherently consumptive process. See, e.g., Fourth Report of the Special Master 53-79, *Kansas v. Colorado*, No. 105, Orig. (2003). In any event, it is assumed for purposes of ruling on the Motion to Dismiss that irrigation of post-Compact acreage in Wyoming is causing depletions of the Tongue and Powder Rivers, in derogation of Montana's protected rights under Article V.

This understanding of the effects of putting new acreage under irrigation was clearly shared by the drafters of the Compact. The term "Beneficial Use" is defined in the compact to be "that used by which the water supply of a drainage basin is *depleted* when usefully employed by the activities of man." App. to Compl. at A-5. Thus, it was the contemplation of the drafters of the Compact that irrigation water use would have the effect of depleting the water supply. As explained above, depleting the water supply in a way that deprives Montana of part of its allocated share under Article V of the Compact is a violation of the Compact, something that this Court has repeatedly declared that it will address.

E. Wyoming's Increased Consumption on Pre-Compact Irrigated Acreage Can Violate the Compact.

For purposes of the Motion, this Court should assume the truth of Montana's allegation that Wyoming has allowed the consumption of water on existing irrigated acreage in the Tongue and Powder River Basins to be increased and that the effect of that increase is to deplete the flows of the Tongue and Powder Rivers. (Compl. ¶ 12). This allows the Court to reach the legal question whether Wyoming's depletion of the water supply has the potential to violate the Compact. If that potential is found to exist, then Montana should be allowed to prove the facts supporting that claim. If the activity increases the consumption associated with a particular use, it necessarily decreases the return flows,[7] which, in turn, decreases the supply for downstream users. The amount of return flows, and therefore the water supply for the protected Compact rights in Montana are thus protected from being diminished by increased consumptive use in Wyoming. See Sen. Rep. App. A at 3a.

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[7] When surface water is diverted for irrigation purposes, some of that water is evaporated and some is transpired by the crops. The rest returns to the stream either by running over the land surface to the stream or by percolating down to the groundwater that discharges to the stream. See, e.g., 1 WATERS AND WATER RIGHTS §§ 2.01-2.05 (Robert E. Beck & Amy K. Kelley, eds. 2007), and sources cited therein.

Wyoming states: "Since this claim also relies on the rejected depletion principle, it must be dismissed." Wyo. Br. 55. But, as noted in Part III.B herein, the Compact Article V.A specifically incorporates "depletion" in the definition of beneficial use, and Article V.B incorporates return flows into the accounting. See Sen. Rep. App. A at 3a. The Compact and its drafters did not reject the principle that one State's allocation cannot be depleted by another State.

The fundamental principle, that one State may not deplete another's share of the water under the Compact, explains why Wyoming's second assertion must also fail. That assertion is, "In any case, the Compact does not address delivery methods and does not restrict Wyoming's consumption of water in order to guarantee deliveries to Montana at the state line." Wyo. Br. 56. Montana's claim, however, does not depend on whether specific delivery methods were specified in the Compact. Indeed, the Compact states general principles which this Court is called upon to implement in a way that carries out the intent of the general principles. In this case, the general principle is that waters apportioned to one State shall not be depleted by another State. The test is whether those waters have been depleted. If they have, then the method by which they have been depleted is of no consequence. Whatever method of depleting one State's allocation under the Compact by another State, such depletion constitutes a violation of the Compact.

Article V.A only protects those water rights in each state that were already fully perfected. Article V.B then provides for any increases in water consumption on existing acres and development of new uses from "unused and unappropriated waters." Wyoming's view that its users may increase consumption and depletion to the system by going from a partial supply to a full supply on the same acreage and increasing irrigation efficiency writes the supplemental clause out of V.B and diminishes the protection expressly granted in V.A. *New Jersey v. Delaware*, 552 U.S. ___, 128 S. Ct. at 1420-21. This is true because if Article V.A permits users to increase their consumption under a pre-Compact water right, then there is no logical way to understand purposes served by the supplemental rights language in Article V.B.

F. Montana *Has* Stated a Claim Regarding Wyoming's Groundwater Development.

Montana's claim for relief is not predicated on the notion that the Compact directly apportions groundwater, as a distinct resource, among the compacting States. Rather, the Court has previously observed that, "'groundwater and surface water are physically interrelated as integral parts of the hydrological cycle.'" *Cappaert v. United States*, 426 U.S. 128, 142 (1976) (quoting Charles E. Corker, *Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6*, at xxiv (1971)). As a

result, pumping can and usually has an impact on surface flows in the same basin. See, e.g., Thomas C. Winter, et al., *Ground Water and Surface Water: A Single Resource* (United States Geological Survey Circular 1139 (1998); see also, First Report of Special Master (Subject: Nebraska's Motion to Dismiss, 2 n.3), *Kansas v. Nebraska & Colorado*, No. 126, Orig. (2000) ("Beyond being an assumed fact for the purpose of deciding this Motion, the hydraulic connection between stream flow and groundwater is a well established scientific fact"). [Hereinafter "Report of Special Master"] Special Master McKusick emphasized the longstanding awareness of the interconnection between groundwater and surface water in recommending to the Court that Nebraska's Motion to Dismiss in No. 126, Original, be denied (the Court denied the Motion to Dismiss. 530 U.S. 1272 (2000)):

> In addition, the scientific community well understood that hydraulic connection. *See*, C.F. Tolman & Amy C. Stipp, *Analysis of Legal Concepts of Subflow and Percolating Waters*, 21 Or. L. Rev. 113, 115-29 (1942) (reviewing the principles of interrelation between surface flow and groundwater and stating that '[t]he significance of the fact that ground water never occurs as a stationary water body should be stressed. Ordinarily, the subsurface reservoir is continuously receiving additions by influent seepage from rainfall and surface water bodies and is always discharging water by natural processes. In the subsurface reservoir ground water is percolating toward the discharge

> area; no static ground-water bodies are known to exist.'); Samuel C. Wiel, *Need of Unified Law for Surface and Underground Water*, 2 S. Cal. L. Rev. 358, 362 (1921) (pointing out that '[a]lthough varying greatly in degree, connection between surface streams and groundwater is usual, and in fact invariable'). Report of Special Master 24.

Based on these well-founded principles, Montana has alleged that post-Compact groundwater pumping in Wyoming has depleted Montana share of the "water supply" necessary to satisfy its pre-Compact uses. App. to Compl. at A-5, A-8. Montana asserts that the "water supply" of the Yellowstone River System depends on groundwater and that, if Wyoming intercepts those contributions through post-Compact groundwater pumping, changing the hydraulic gradient, or actively taking water from the stream, Wyoming deprives Montana of its allocated share.

According to the Wyoming Brief, "The Compact drafters made it clear in plain language throughout Article V that they intended the Compact to govern surface water, not groundwater." Wyo. Br. 59. Wyoming bases its argument on two propositions: (1) there is no mention of groundwater, and (2) the Yellowstone River Compact is not a "depletion" compact. Neither of these arguments have merit.

The first argument was rejected by this Court in *Kansas v. Nebraska and Colorado*, No. 126 Orig., involving the Republican River Compact. As with the

Yellowstone River Compact, the Republican River Compact made no mention of groundwater or wells. The groundwater question was referred to Special Master Vincent L. McKusick, who concluded:

> The Compact fully allocates the entire natural stream flow of the Basin undepleted by the activities of man. By the factual pleading of the Kansas Complaint, which the Court can assume to be true for the purpose of ruling on the Motion to Dismiss, groundwater pumping in Nebraska, obviously an activity of man, is depleting that stream flow because the pumped groundwater and the stream flow are hydraulically connected. To whatever extent groundwater pumping depletes the stream flow in the Basin, such depletion constitutes consumption of a part of the virgin water supply and must be accounted against the allocated share of the pumping State. The use of a State's allocation through groundwater pumping is permissible, but such pumping is subject to the restrictions imposed by the Compact allocations.
>
> In sum, I conclude that *the Compact restricts groundwater consumption to whatever extent it depletes stream flow* in the Republican River Basin. I therefore recommend that Nebraska's Motion to Dismiss be denied. *Id.* at 1-3 (footnote omitted) (emphasis added).

The Supreme Court denied the Motion to Dismiss, thereby rejecting the upstream States' arguments. See *Kansas v. Nebraska and Colorado*, 530 U.S. 1272 (2002).

Like the Yellowstone River Compact, the Republican River Compact made no specific reference to groundwater pumping or wells. See Report of Special Master at 22 ("Thus, the comprehensive definition of water supply, even without use of the express term 'groundwater,' requires a conclusion that, as a matter of law, a State can violate the Compact through excessive pumping of groundwater hydraulically connected to the Republican River and its tributaries.").

The logic applied by the Supreme Court to interstate river compact enforcement cases is that any depletion of the interstate river in one State, by groundwater pumping or otherwise, is to be counted as part of that State's use of its compact allocation. This was the holding of the Court even though groundwater was not mentioned in the Pecos River Compact. E.g., *Texas v. New Mexico*, 462 U.S. 554, 557 (1983) ("If development in New Mexico were not restricted, especially the groundwater pumping near Roswell, no water at all might reach Texas in many years"); see also, *Kansas v. Colorado*, 543 U.S. 86, 91 (2004) (groundwater pumping held to violate Arkansas River Compact).

Wyoming's second ground for its argument that the Yellowstone River Compact is not intended to govern groundwater is that this is a "depletion" compact: "Thus, Montana's groundwater allegation is based on its assertion that the Compact is a depletion compact." Wyo. Br. 63 (emphasis in the original). Wyoming again mistakes the measuring formula in Article V.C with whether the rights of the States to

their pre-Compact water supplies that are protected under Article V can be depleted by groundwater pumping. As explained in Section III.B.5 above, these are two totally different concepts used for totally different purposes.

In essence, Wyoming is arguing that, if its groundwater pumping were to dry up the flows going to Montana from Wyoming in the Tongue and Powder Rivers, Montana would have no remedy under the Yellowstone River Compact. This is contrary to the fundamental concept of an interstate water apportionment by compact.

G. The *Amicus* Brief Misunderstands Both the Court's Precedents and Montana's Claim in This Case.

Anadarko incorrectly concludes that the Yellowstone River Compact is not a complete apportionment, citing differences in language between the Yellowstone River Compact and the Republican River Compact. Anadarko Br. at 10.

Like the Republican River Compact, the Yellowstone River Compact apportionment broadly applies to "waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park." App. to Compl. at A-1. Article V.A of the Yellowstone River Compact protects "beneficial uses," defined as "that use by which the water supply of a drainage basin is depleted when usefully employed by

the activities of man." App. to Compl. at A-5; (*compare* Republican River Compact, 57 Stat. 86-87 (1943) (defining "virgin water supply" as water "undepleted by the activities of man"). Article V.A applies to the Yellowstone River system, defined as the "Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth . . . except those portions thereof which are within or contribute to the flow of streams within Yellowstone National Park. Article II.D App. to Compl. at A-5. Any groundwater use, removal, or pumping in Wyoming is an "activity of man" by which the water supply of the basin is depleted. As in the Republican River Compact, Article V.A protects Montana's beneficial uses from post-Compact groundwater pumping or other "activities of man" in Wyoming that deplete the basin to the extent that Montana is deprived of the "water supply" necessary to satisfy its pre-Compact uses. See Report of Special Master at 22 (interception of stream sources by groundwater pumping can violate compact).

Anadarko makes two additional arguments that bear noting. First, it argues that the definition of "Divert" and "Diversion" indicate that the Compact was not intended to address groundwater. Anadarko Br. at 7-10. "Divert" and "Diversion" are defined by the Compact to mean "the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken." Article II.G. Anadarko mistakenly construes this provision to

mean "taking water from the channel," which it understands to exclude groundwater. Anadarko Br. at 15 n.8. This Court has recognized, however, that the term "diversion" is broad enough to encompass both surface and groundwater. *Cappaert*, 426 U.S. at 143 ("we hold that the United States can protect its water from subsequent diversions, whether the diversion is of surface or groundwater"). Basic principles of hydrology have long recognized that water may be removed from a river such as the Yellowstone River or tributary thereof by groundwater pumping. Moreover, the term "diversion" does not appear in Article V.A, and the fact a "diversion" does not occur where water is removed from the Yellowstone River or tributary, but returned to the channel as return flow reinforces the notion that the Compact is concerned with protecting water supply to Montana.

Second, Anadarko argues that the Compact does not address groundwater that would not naturally reach the surface so as to affect river flow in Montana. Anadarko Br. at 13-16. Montana generally agrees that the Compact does not address groundwater that does not affect water supply in Montana. However, the determination of whether groundwater does or does not affect water supply in Montana is a factual determination that is not before the Court on Wyoming's Motion to Dismiss.

IV. CONCLUSION

Wyoming's Motion to Dismiss should be denied.

Respectfully submitted,

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May 2008

APPENDIX A

Calendar No. 837

82D CONGRESS)	SENATE	(REPORT
1st Session)		(No. 883

GRANTING THE CONSENT OF CONGRESS TO A COMPACT ENTERED INTO BY THE STATES OF MONTANA, NORTH DAKOTA, AND WYOMING RELATING TO THE WATERS OF THE YELLOWSTONE RIVER

OCTOBER 2 (legislative day, OCTOBER 1), 1951. – Ordered to be printed

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Mr. O'MAHONEY, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany S. 1311]

The Committee on Interior and Insular Affairs, to whom was referred the bill (S. 1311) granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River, having considered the same report favorably thereon without amendment and with the recommendation that the bill do pass.

THE PURPOSE OF THE BILL

The bill would give the consent of Congress to a compact entered into between the States of Montana, North Dakota, and Wyoming providing for an equitable division of the use of waters from the Yellowstone River and its tributaries. Public Law 83, Eighty-first Congress, approved June 2, 1949, gave the consent of Congress to negotiate and enter into a compact, provided for the appointment of a Federal representative to represent the United States in the negotiations and to report thereon to the Congress. The compact was agreed to by the several representatives of the affected States at Billings, Mont., on December 8, 1950, and the States ratified the compact early in 1951.

APPORTIONMENT OF USE OF WATER

The compact appears to be fair and equitable in apportioning the use of waters of the Yellowstone Basin, as defined. The compact provisions are easily administered, and require no elaborate organization. In all respects, it presents an unusually practicable solution to the problems which, during the early years of negotiations, seemed highly complicated and difficult.

The Yellowstone River Basin and the Yellowstone River system (i.e., the river and its tributaries) are, for the purposes of the compact, exclusive of the Yellowstone National Park area and its waters, and the waters of the Little Bighorn River.

The apportionment, or division, of the waters of the basin is provided in article V, subsections A, B, and D, as follows:

V-A. Existing appropriative rights as of January 1, 1950, are recognized in each of the signatory States. No regulation of the supply is mentioned for the satisfaction of those rights, and it is clear, then, that a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing. Where these rights have deficient supplies they would be supplemented by rights obtained from "unused and unappropriated waters" in the basin as of January 1, 1950, from the allocated waters under subsection B. North Dakota rights are covered specifically in subsection D.

V-B. Unused and unappropriated waters as of January 1, 1950, of the four interstate tributaries, the Clarks Fork of the Yellowstone, the Big Horn, Tongue, and Powder Rivers, all of which rise in Wyoming and join the main stem of the Yellowstone River in Montana, are allocated in variable percentages between Montana and Wyoming. The definition of these waters is found in subsection C of article V. The allocations (by the method of computation of the waters not appropriated and used as of January 1, 1950) are percentages of divertible and storable waters in each tributary basin during any water year or at any time in the water year after its beginning (October 1). Allocations, thereby, take into account return flows and uses of them, as well as original runoff. This results from the computation directive which says, in effect, that allocated flows are the sum

of diversions and outflows from the tributary basin corrected for changes in the storage of such waters.

V-D. Below Intake, Mont., the flows in the Yellowstone River are apportioned between Montana and North Dakota on the basis of acreages irrigated in each State. Tributary streams below Intake are allotted to the States in which they are situated.

The use of the waters of the Yellowstone River which flow from the Yellowstone National Park and accrue from Montana tributaries and general runoff in Montana is not affected by the compact, provided, that uses originating subsequent to January 1, 1950, do not deplete the flows below Intake to a point where older priorities are injured.

Subsection V-E provides that:

1. Existing and future domestic and stock-water uses of water: *Provided*, That the capacity of any reservoir for stock water * * * shall not exceed 20 acre-feet –

are excluded from the provisions of the compact. Thus, the States have agreed that domestic and stock-water uses shall be unrestricted, subject only to the limitation in capacity of a stock-water reservoir. This subsection is identical in its effect to like provisions of the Belle Fourche River compact.

COMMENTS OF BUREAU OF THE BUDGET AND DEPARTMENT OF THE INTERIOR

The report of the Bureau of the Budget of September 14, 1951, states that the Department of Justice believes that the compact does not adequately

preserve, protect, or recognize the interests, sovereignty or jurisdiction of the United States in the "area of waters" affected. Justice believes the term quoted above to be obscure and possibly conflicting; that the allocations between the States of "unused and unappropriated waters" may possibly deprive the United States of the use of surplus water it has anticipated would flow into the Missouri River; that the provisions that the commission (created by the compact to administer the compact) may sue and be sued might be construed to waive the sovereign immunity of the Federal Government from suit.

Justice recommends that the undesirable provisions be alleviated, or made impotent, by substituting a different form of consent to the compact, and such a form is included in its comments.

The committee has considered these objections and the recommendation. In article XVI(a), it seems clear that the "area of waters" can only refer to the places where Yellowstone River waters may be held or may be flowing, and that such sovereignty or jurisdiction as the United States may have over them is not impaired by the compact. The sentence containing the ambiguous term, "area of waters," continues to say that the compact does not impair or affect any rights or powers of the United States – in and to the use of the waters of the Yellowstone River Basin nor its capacity to acquire rights in and to the use of said waters.

Article V-B, it is true, allocates to the States the "unused and unappropriated waters," but this follows V-A which recognizes all existing beneficial uses as of January 1, 1950. As to these "unused and

unappropriated waters," the United States is not barred if their uses conform to the division between the States, as, for example, in developing a reclamation project in compliance with Federal and State water laws. Nothing new is involved here; only customary practices are contemplated by the affected States. If the Department of Justice has in mind new theories of Federal ownership of these waters respecting navigation, for example, this matter is settled by the O'Mahoney-Millikin amendment to the Flood Control Acts of 1944 and 1946. If the use of water for power is in question, the agreement of Federal agencies and the States upon the water supply studies of April 1951 is sufficient to indicate that it is the view of these agencies and the States that, as a practical matter, the provisions of the O'Mahoney-Millikin amendment will also apply to water use for power.

As to article III-G, relating to suits by or against the Commission in the Federal courts, the fears of Justice that the language might waive the sovereign immunity of the United States seem to have little basis. The Commission is created for specific purposes only. The powers of the Commission are limited to carrying out the provisions of the compact, namely, to require that the division of the waters among the affected States be in conformity with compact articles V to X, inclusive, and affect only Montana and Wyoming operations. The Federal member of the three-man Commission will represent the United States Geological Survey, an agency entrusted with the survey of the water resources of the basin. The Federal member may vote only when the Montana and Wyoming members fail to agree on the administration of

the terms of the compact. His action would bind the Commission, not the United States. The United States is not a party to the compact.

Public Law 83, Eighty-first Congress, approved June 2, 1949, gave the consent of Congress to the negotiation of the Yellowstone River compact:

upon condition that one suitable person, who shall be appointed by the President of the United States, shall participate in said negotiations as the representative of the United States and shall make a report to Congress of the proceedings and of any compact or agreement entered into * * *.

This provision does not make the United States a party to the compact.

The Federal representative, appointed pursuant to Public Law 83, was Mr. R. J. Newell, formerly regional director, Bureau of Reclamation, being stationed at Boise, Idaho, for many years. In his report, Mr. Newell says that when the negotiations began he received specific instructions from the President concerning the protection of the interests of the United States. He says these instructions were carefully and fully observed, and the compact meets his approval.

The report of the Secretary of the Interior of September 27, 1951, is favorable, and notes that the compact will enable the Federal Government and the States to expedite developments of works in upper portion of the Missouri River Basin which are presently authorized.

Following is the report of Mr. R. J. Newell, Federal representative, and reports of the Bureau of the

Budget and the Department of the Interior, all of which are presented in full:

BOISE, IDAHO, *March 16, 1951.*

Hon. ALBEN W. BARKLEY,
President of the Senate, Washington, D. C.

MY DEAR MR. PRESIDENT: I have the honor to enclose a conformed copy of a compact entered into on December 8, 1950, among the States of Montana, North Dakota, and Wyoming to determine the rights and obligations of those States respecting uses of the waters of the Yellowstone River and its tributaries.

By virtue of my appointment by the President as the representative of the United States, I participated in the negotiations which led to the compact. My report thereon is enclosed.

Sincerely yours,

R. J. NEWELL,
Representative of the United States,
Yellowstone River Compact Negotiations.

REPORT TO THE CONGRESS BY THE FEDERAL REPRESENTATIVE ON THE YELLOWSTONE RIVER COMPACT

By the act of June 2, 1949 (Public Law 83, 81st Cong.), Congress granted its consent to the States of Montana, North Dakota, and Wyoming to negotiate and enter into a compact or agreement for the division of the waters of the Yellowstone River excepting waters within or tributary to the Yellowstone National Park.

Commissioners representing these States, after negotiations extending over a year, have reached final

agreement on the provisions of the proposed compact at a meeting held in Billings, Mont., on December 7 and 8, 1950, and each one of them has affixed his signature thereto. The State Legislature of Wyoming ratified the agreement by an act signed by the Governor on January 27, 1951, Montana's Legislature likewise approved and the Governor signed on February 13, 1951, and North Dakota's Legislature approved and the Governor signed on March 7, 1951.

The authorizing act required that a Federal representative be appointed to participate in the negotiations and to report to the Congress on the proceedings and on any compact or agreement entered into. Accordingly, the President, on October 19, 1949, appointed me as such Federal representative, and I have participated in the negotiations of the commissioners and hereby report as directed.

I believe that the proposed compact is a sound basis for further development in the use and control of waters of the Yellowstone River for multiple purposes, especially for irrigation, that the division of the waters among the States as agreed on is equitable, and that the rights of the United States are properly protected, and, therefore, I recommend that the consent of Congress be given the proposed compact, a copy of which is attached.

Further report follows:

Previous Negotiations

Three previous compacts have been negotiated on the Yellowstone River. The first of these was signed in February 1935. It concerned only the States of Montana and Wyoming, and was never acted upon by the

legislatures. The second compact was negotiated in 1942 and went to the legislatures in 1943. This concerned the three States – Montana, Wyoming, and North Dakota. The Wyoming Legislature was the first to take action on this compact and failed to ratify it. A third compact, quite similar in form to the previous compact, was negotiated in 1944, and reached the Legislatures of Montana, Wyoming, and North Dakota in 1945. This compact was ratified by North Dakota, Montana, and by the Legislature in Wyoming, but was vetoed by the Governor of Wyoming. The present compact is therefore the fourth that has been negotiated by Montana and Wyoming, and the third to concern all three States.

Area Involved

The drainage basin of the Yellowstone River, from its source in the highlands of the Rocky Mountains extending downstream through north central Wyoming and southeastern Montana to its mouth a few miles below the Montana-North Dakota line, is involved in the proposed compact.

The area drained comprises over 70,000 square miles, of which roughly 1,500,000 acres are being irrigated. The irrigated land is almost equally divided between Montana and Wyoming with less than 2 percent in North Dakota. Investigations indicate that suitable land is at hand feasible to irrigate and available water supply is adequate, if conserved, to increase the irrigated area by about 34 percent. The increased area is also about equally divided between Montana and Wyoming with a minor acreage in North Dakota.

Purposes

The major purposes of the proposed compact, as stated therein, are to promote interstate comity, to remove causes of present and future controversy between the States with respect to the waters of the Yellowstone River and its tributaries, to provide for an equitable division and apportionment of such waters and to encourage the beneficial development and use thereof. Installation of physical works needed to foster that use has been delayed pending an agreement between division of waters.

State Commissioners

The following commissioners were appointed by the respective governors represent their States in the negotiation of the proposed compact:

For Montana	For Wyoming	For North Dakota
Fred E. Buck	L. C. Bishop[3]	
A. W. Bradshaw	Earl T. Bower	I. A. Acker
H. W. Bunston	J. Harold Cash	Einar H. Dahl
John Herzog	Ben F. Cochrane	J. J. Walsh
John M. Jarussi	Ernest J. Goppert	
Ashton Jones	Richard L. Greene	
Chris. Josephson	E. C. Gwillim	
A. Wallace Kingsbury	E. J. Johnson	
	Lee E. Keith	
P. F. Leonard	N. V. Kurtz	
Walter M. McLaughlin	Harry L. Littlefield	
Dave M. Manning	R. E. McNally	

Joseph Muggli	Will G. Metz
Chester E. Onstad	Mark N. Partridge
Ed F. Parriott	Fred V. Portz[4]
Axel Persson[1]	Alonzo R. Shreve
R R. Renne[2]	Charles M. Smith
Keith M. Trout	Leonard F. Thornton
	M. B. Walker

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[1] Resigned.

[2] Appointed just prior to final meeting.

[3] Represented at formal meetings by Deputy Earl Lloyd.

[4] Died.

The State engineer was included in each State group as that officer bears important responsibilities in connection with the administration of the State's water supplies. However, these responsibilities vary from State to State. Consultants and advisors assisted in the negotiations.

Federal Contribution

The office of region 6 of the Bureau of Reclamation furnished a legal advisor and a secretary and took care of all recording, duplicating, correspondence and the like. The Bureau also contributed a great amount of data on land surveys, water records, etc. The Bureau of Indian Affairs, through the area engineer at Billings, also furnished similar data

concerning the large area of Indian lands in the basin.

NEGOTIATIONS

Four formal meetings of the full commission, all at Billings, Mont., were held on the following dates: November 29, 1949; February 1 and 2, 1950; October 24 and 25, 1950; December 7 and 8, 1950.

Minutes of these meetings were made and adopted officially by the commissioners. They have been assembled and labeled "Yellowstone River compact–Minutes of formal meetings of the Yellowstone River compact commissioners." They are not being sent out as part of the text of this report, but copies are being furnished for the official files of the appropriate committees of Congress and for the General Services Administration of the United States for filing with the original of the compact. Each of the meetings was well attended, though three were held in winter and the commissioners came from widely scattered points over a huge area. Meetings were open to the public and the press. Because of the size of the group, including 39 commissioners and a number of advisers, consultants, and other interested parties, much of the detail work of collecting and digesting information and drafting language had to be done in smaller committees. Informal meetings of representatives of interested Federal agencies were held on November 28, 1949, and February 2, 1950.

A drafting committee made up of attorneys from each of the three States held one meeting in August 1950, and attempted to draft language satisfactory to all parties.

However, most of the ground work was laid, most of the material gathered and most of the questions answered by an engineering committee made up of the State engineers of the three States, the area engineer of the Bureau of Indian Affairs, and the district engineer of the Bureau of Reclamation, Yellowstone district, and assisted on occasion by numerous others, from private, State and Federal ranks, who had information of value to offer. This committee held a number of meetings and made one field trip throughout the length of the Big Horn River (largest tributary of the Yellowstone) to check field data on the ground.

Main Features of the Compact

The compelling reason for the negotiation of a compact was the need for agreement on division of the waters of interstate tributaries in the Yellowstone River Basin that would allow further development to go forward. Because the main stem of the river is almost entirely in Montana and its water supply under any future program appears adequate for feasible developments along its course, it was given little consideration in the negotiations. While North Dakota's representatives contributed in an important measure to the work of the commission, the real interest of the State in the compact is minor on account of the very small part of the drainage basin that is within its borders. The waters in Yellowstone National Park and tributary thereto were expressly excluded by the language of the authorizing act. The real problem and the purpose of the undertaking was then to divide the waters of four principal tributaries,

the Clarks Fork, Big Horn, Tongue, and Powder, all rising in Wyoming and flowing across the State line into Montana, with developments, existing and proposed, in both States.

In earlier attempts to arrive at a compact and in the early meetings here reported, there was searching discussion as to whether the agreement sought on division of waters should include the water now appropriated and in use or should apply only to the unappropriated and unused balance which is available for further development. The latter principle was decided on (art. V-A) for several reasons. First, it would be a huge and time-consuming task to determine and fix comparable values for existing rights in three States with differing water laws and practices in establishing water rights. Second, the basic fact that there is enough water if properly conserved by storage to take care of all existing and all feasible future developments points up the importance of arriving promptly at the simplest workable agreement that would permit such storage projects to proceed. When these are built, even the operation provisions of the compact are expected to become easy of administration.

It is further agreed (art. V-B) that existing irrigation developments with an inadequate supply should have a preferred right to the unused remainder over new projects.

The final residue of supply was then divided between the States for further development. The basis for the division on each tributary was the acreage of land in each State that could be feasibly irrigated from that tributary, the requirements used to determine feasibility being the same in each State.

For supervision of the operation of the compact, a commission is provided for, made up of one member from each of the States of Montana and Wyoming, to be appointed by the respective Governors, and one member to be appointed by the Director of the Geological Survey. The State representatives on this operating commission could be the State engineers who are usually charged with the supervision of water right matters in irrigation States, in which case no new positions would be created. The Geological Survey was made responsible for the third member for the reason that traditionally its Surface Water Division has intimate contact and accepted responsibilities in connection with the flow of streams and water surveys generally and the States have come to depend on the cooperation of this agency. The State of North Dakota, at the request of its representatives, was rather reluctantly relieved of the responsibility and expense of operations because the interests of the State in the results were so disproportionally small.

In determining the amount of water subject to allocation, the "divertible flow" principle was chosen over the "depletion" principle, because the former had been used in earlier negotiations and was more familiar to the commissioners, who were assured by the consultants that the latter had no outstanding advantages even though it had been selected on the upper Colorado.

Existing and future domestic and stock water uses were excluded from the provisions of the compact, with a limitation on the size of stock ponds. A large number of stock ponds have been constructed or are contemplated by individuals and agencies in the open range country, and the question has been raised

whether their multiplication might have a material effect on water supplies available for major purposes. A study of the proposed developments in the Yellowstone River Basin discloses that the feasibility of no project depends on or would be affected appreciably by these ponds, located as they are in the plains area away from live streams and collecting water that otherwise would probably never reach the river system anyway.

Federal Interests

In the course of the negotiations, a letter was received from the President enclosing a memorandum from the Bureau of the Budget and calling attention to questionable provisions in recent interstate compacts which were apparently contradictory and which imposed restrictions on the use of water by the United States. The suggestions in that letter have been followed and incorporation in this compact of provisions such as were referred to has been scrupulously avoided. In article XVI of the compact, it is specifically provided that nothing in that document shall "impair or affect * * * any rights or powers of the United States of America, its agents, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin. * * * " This unmistakably clear language, together with the provision that nothing in the compact shall "subject any property of the United States of America, its agents or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the compact," furnishes complete protection to the United States against any

possible adverse effect, the existence of which I cannot foresee, that might arise from any other portion of the compact to which the Congress' consent is given. Attention is specifically invited, moreover, to the fact that although the States have, in paragraph D of article VII of the compact, agreed among themselves that the use of allocated waters on Federal projects constructed after the date of the compact shall be "charged" to the State in which the water is used, they have not attempted to limit its use to those waters.

The particular concerns of departments and agencies of the Federal Government were inquired into and given serious consideration throughout the negotiations. All agencies known to have interests in the basin were kept informed of the progress of negotiations and were invited to have representatives present at the meetings. These included the Department of the Army, Department of Interior, Department of Agriculture, Federal Power Commission, Department of Commerce, Reconstruction Finance Corporation.

Two separate meetings were held with Federal men to bring out their views. Regular meetings of the commissioners were attended by 12 to 20 men from Federal agencies. When a draft of compact was ready for final consideration, copies were circulated to the following agencies with request for comment in 30 days. Helpful comments and suggestions were received from Department of Agriculture, Corps of Engineers, Bureau of Reclamation, National Park Service, Bureau of Indian Affairs.

All comments were given consideration, some suggested language was adopted verbatim and other

suggestions were taken care of in various ways. It is believed that there are no provisions in this compact and no omissions to which Federal agencies seriously object. However, attention has been directed by the Bureau of Reclamation to subparagraph E-2 of article V which excludes from the provisions of the compact "Devices and facilities for the control and regulation of surface waters." This language was inserted to meet a request by the Department of Agriculture for exclusion of so-called "water-spreading devices" which are recommended for installation on the open plains to reduce erosion from heavy local rains. It is not believed that this could be interpreted as applying to major storage reservoirs.

It should be specially noted that there are great areas of Indian land in the Yellowstone River Basin in both Montana and Wyoming, much of which is irrigated or proposed to be irrigated, and the interest of the Bureau of Indian Affairs in the compact is important. Indian Bureau men attended all meetings, furnished much information, and lent continuous engineering help to subcommittees. The language submitted by them to cover Indian interests in the compact was adopted verbatim.

Conclusion

The effort that has been carried on by the States for nearly 20 years to secure a compact for the division of the waters of the Yellowstone River and its tributaries would seem to be conclusive evidence that such a compact is needed. The instrument submitted herewith is the result of a year's intensive study and discussion by a large number of qualified State

commissioners with the benefit of all past negotiations and the cooperation of many Federal agencies and private individuals, ending finally in agreement by all. The plan proposed appears to be easily installed, workable, and not requiring the establishment of a large new organization for its operation. The division of the waters is believed to be equitable and fair. Obstacles to the continued orderly development of resources would be removed. The rights of the United States seem to be fully protected. Therefore I recommend that the proposed compact be approved by the Congress of the United States.

R. J. NEWELL,
Federal Representative,
Yellowstone River Compact Negotiations.

NOTE. – It is now understood that the archives of the Department of State are no longer the proper depository for such documents as the Yellowstone compact. The General Services Administration having taken over this function, the authoritative original of the compact, if finally approved, will be filed with that body.

R. J. N.

EXECUTIVE OFFICE OF THE PRESIDENT,
BUREAU OF THE BUDGET,
Washington 25, D.C., September 14, 1951.

Hon. JOSEPH C. O'MAHONEY
United States Senate, Washington 25, D.C.

MY DEAR SENATOR O'MAHONEY: Receipt is acknowledged of your letter, dated April 12, 1951,

requesting our report on S. 1311, a bill granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River.

In response to my request for the views of the Department of Justice, the Deputy Attorney General indicates that while article VI of the compact is apparently designed to protect the interests of the United States, the language used is rather ambiguous. The preservation of the rights of the United States is rendered somewhat obscure due to the possible conflicting interpretations of the terminology "area of waters" in the language "To impair or affect the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such compact, any rights or powers of the United States of America, its agencies, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin nor its capacity to acquire rights in and to the use of said waters."

He also calls attention to article V, B of the compact under which the signatory States allot themselves all "unused and unappropriated waters of the interstate tributaries of the Yellowstone River" as possibly depriving the United States of the use of surplus water it has been anticipated would flow into the Missouri River.

Also in the Deputy Attorney General's opinion, the broad authority contained in the provision that the commission may sue and be sued might be construed, in view of the Federal representative thereon, to indicate that the Federal Government has waived its sovereign immunity from suit.

Finally, he recommends that in the event Congress should desire to approve the compact as drafted, such approval be essentially in the following language:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That approval by the Congress is hereby given to the Yellowstone River compact: *Provided, however*, That this approval of the compact does not in any way subject the United States to the terms of the compact or affect its sovereignty, jurisdiction, power, authority, rights to the use of water, property, prerogatives, or responsibilities in, to, or over the Yellowstone River and its tributaries."

The Secretary of the Interior, in his proposed report on H. R. 3544, the companion bill to S. 1311, expresses the opinion that the provisions in the compact for the selection of the Federal representative by the Geological Survey rather than the President and that the commission should be subject to suit are regrettable and that the latter "may raise some interesting constitutional questions in the future."

Similarly conflicting provisions appearing in previously consummated compacts prompted the President on May 3, 1950, to write the Federal representatives on various compact commissions cautioning them to exert all efforts to eliminate or correct the areas of possible conflict which might impose restrictions on the use of waters by the United States.

This office is in agreement that the compact method is the proper and logical manner for States to allocate the waters of interstate streams. It is essential, however, that such compacts include adequate

provisions to preserve the rights and interests of the United States and for appointment by the President of a Federal representative as a member of the compact commission. Since the Yellowstone River compact which would be approved by S. 1311 has been ratified by the States of Montana, North Dakota, and Wyoming, it may not now be feasible of revision to provide for the selection of the Federal representative by the President rather than by Geological Survey. While I believe that as a general rule the former is preferable, there may be some question whether in this case the resubmission of the compact to the States to provide for selection of a Federal representative by the President rather than by Geological Survey is justified. It is of fundamental importance, however, that the compact protect the rights and interests of the United States in these waters. The language of the proposed amendment to the bill prepared by the Department of Justice would seem to provide such protection. Accordingly, subject to the consideration of the above comments by the Congress, there would appear to be no objection to enactment of S. 1311 if amended to assure the protection of the interests of the United States as recommended by the Department of Justice.

Sincerely yours,

ELMER B. STAATS,
Acting Director.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington 25, D. C., September 27, 1951.

Hon. JOSEPH C. O'MAHONEY,
Chairman, Committee on Interior and Insular Affairs,
United States Senate, Washington 25, D. C.

MY DEAR SENATOR O'MAHONEY: I have for report S. 1311, a bill granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming, relating to the waters of the Yellowstone River. The compact, as approved by the 1951 legislative assemblies of the signatory States, is set out in the subject bill.

One very important part of the plan of this Department for improvements in the Missouri River Basin set forth in Senate Document 191, Seventy-eighth Congress, and approved and authorized for construction in the acts of December 22, 1944 (58 Stat. 887, 891), and July 24, 1946 (60 Stat. 641, 653), is that of supplying new and supplemental water for the irrigation of well over 700,000 acres of land in the Yellowstone River Basin, the installation in that basin of more than 300,000 kilowatts of hydroelectric generating capacity, and provision of reservoirs for these and other purposes with a total capacity of more than 4,250,000 acre-feet. While these figures cannot be regarded as final, they are indicative of the great importance of that basin to the economy of the entire Missouri River Basin and of the Nation. The negotiation of the Yellowstone River Basin compact was, and the Congress' consent to it will be, an important step toward permitting realization of the basin's potentialities without bickering between the States.

The compact provides that its operation shall not "impair or affect the sovereignty or jurisdiction of the United States of America in and over the area of waters affected" by it or "any rights or powers of the United States of America, its agents, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin" or its capacity to acquire such rights, that it shall not be taken to "subject any property of the United States of America, its agencies, or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the compact," and that its terms do not cover "waters within or waters which contribute to the flow of streams within the Yellowstone National Park." The compact, moreover, provides that its terms shall not "be so construed or interpreted as to affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations." The water rights of the Indians were reserved by the Indians at the time of the creation of the respective reservations by the treaties entered into by the Indians with the United States. These Indian water rights have been recognized by the Supreme Court of the United States. The most important decision is the case of *Winters v. United States* reported in 207 U.S. 564. This situation explains the inclusion of the language just quoted. A further safeguard to Federal interests is to be found in section 2 of S. 1311; i.e., in the express reservation to Congress of its right to alter, amend, or repeal the act.

It long has been recognized that the fuller use of the water resources of the Yellowstone River Basin

contemplated in Senate Document 191 is dependent entirely upon the construction and operation of storage reservoirs to regulate and conserve the water yields of the principal streams of the basin. These streams, in addition to the Yellowstone River itself, are its four large interstate tributaries, each rising in Wyoming and flowing into Montana: The Clarks Fork, Yellowstone River; the Big Horn River; the Tongue River; and the Powder River. Of these streams, the Yellowstone River, which is the main stem of the river system of the Yellowstone Basin, needed little consideration in the negotiation of the compact because it is almost entirely in Montana and its water yield seems to be adequate for any program of feasible developments along its course, and the Clarks Fork, Yellowstone River, one of the tributaries, is not likely to experience water shortages. Hence, the problem streams are the three remaining large interstate tributaries. The elements that make these interstate tributaries problem streams are the existing irrigated developments and the potential and possible irrigated developments. (In this connection, I am advised that the compact commissioners recognized a distinction between potential developments and possible developments. Potential developments are those which, it was thought, are definitely feasible, while possible developments are those which could be developed only at a very high cost or for which a water supply seemed questionable.)

The practical accomplishment, in the circumstances, of an equitable apportionment of the benefits of the waters of the Yellowstone River system among the States of Wyoming, Montana, and North Dakota will require the construction, at strategic sites, at or

near the Wyoming-Montana State line, of storage reservoirs so that the residual flows from Wyoming can be controlled and conserved for use in the lower States of Montana and North Dakota. Fortunately, such strategic reservoir sites are available on the Big Horn River, the Tongue River, and the Powder River.

Article V of the compact is the article that sets out the apportionment of the benefits of the water resources of the basin among the signatory States that they have agreed upon. Extensive studies by an engineering committee, appointed by the commission to advise it, disclosed that little could be gained, from a water supply standpoint, by attempting, in the compact, the regulation and administration of existing appropriative rights in the signatory States. (The engineering committee comprised the State engineers of the three States and two Federal engineers from the Bureau of Reclamation and the Bureau of Indian Affairs.) Accordingly, paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Paragraph B of article V is the core of the compact. The following analysis of this paragraph is made:

(1) The unused and unappropriated waters of the interstate tributaries only are treated; i.e., the waters that are residual to those required for the enjoyment of the appropriative rights that are recognized in paragraph A of article V.

(2) The supplemental water supplies that are needed for the better enjoyment of the rights recognized in paragraph A of article V are given a preferred status over water supplies for new projects.

(3) The water that is residual after the enjoyment of the rights in paragraph A of article V and after the furnishing of the supplemental water supplies to the projects with the rights recognized in paragraph A are allocated to Wyoming and to Montana in stated percentages. I am informed that these percentages were calculated, in accordance with the recommendation of the engineering committee, by dividing the total of the potential and possible acres in Wyoming and in Montana by the total of the potential and possible acres in both States.

In paragraph C of article V, there is adopted a modified version of the divertible flow principle. Under the formula adopted, the apportionments stated in paragraph B are made operative in terms of cumulative volumes of water throughout a water year, fixed as October 1 of any year through September 30 of the succeeding year, in order to accommodate the new projects in the basin which must rely on storage water rather than on natural flow.

Considered with paragraph A of article V, paragraph D of article V gives to the Lower Yellowstone Federal reclamation project in Montana and North Dakota the protection of a right existing January 1, 1950. Additionally, paragraph D recognizes all rights in the beneficial use of water than existed in Montana and North Dakota on January 1, 1950, and that divert below Intake, Mont., and it permits the beneficial use of the flow of water of the Yellowstone River below Intake, Mont., on lands within Montana and

North Dakota on a proportionate basis of acreage irrigated. This latter provision is important, particularly to North Dakota, because the flow of water of the Yellowstone River below Intake, Mont., will be residual water after the use of water above Intake, Mont. The flow will thus be not only a regulated flow, as a consequence of the construction and operation of the reservoirs at the strategic sites on the Big Horn River, the Tongue River, and the Powder River, but it will also include the return flows that are certain to appear below Intake, Mont., with the expansion of irrigation after storage water becomes available. The sharing of this residual flow by Montana and North Dakota, on a proportionate basis of acreage irrigated, will keep the new developments in the two States in balance and minimize future interstate disputes.

The inclusion in paragraph E of article V of special provisions relating to stock water ponds and to "devices and facilities for the control and regulation of surface waters" is a recognition of the importance of stock raising, and modern soil-conservation practices in the economy of the area. Neither of these items will adversely affect existing Federal projects in the basin. Item 2 of paragraph E, moreover recognizes and rests upon the distinction between surface waters and appropriable waters. In other words, waters which diffuse over the land and do not flow intermittently or continually through and into natural water courses are permitted, so far as the compact is concerned, to be controlled and regulated by devices and facilities installed by the owner of the land on which such waters are diffused.

Paragraph F of article V amounts to a recognition that the allocations made in article V may have to be

reconsidered from time to time so that they can be made to conform to demonstrated experience where that proves to be at variance with the calculated belief, such belief necessarily governing the allocations in the first instance.

Articles VII, VIII, and IX implement the use of allocations made in article V. Of particular interest is the provision in article VII expressly permitting diversions to be made and structures to be erected in one State for the benefit of users in another. The inclusion of this provision is in harmony with the decision of the Supreme Court in *Weiland* v. *Pioneer Irrigation Co.* (259 U. S. 498 (1922)). Also of importance is the phrasing of article VII, paragraph D, which, while providing that the use of allocated waters on Federal projects constructed after the date of the compact shall be charged to the State in which the water is used, does not attempt to limit the use of water in any of the States of the basin by the Federal Government.

I regret the spirit of localism that induced the inclusion in article X of a provision that "No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States." Though I agree that preference in the use of water resources ought generally to be given to the basin of origin, it is hard for me to believe that this is more than a generally desirable rule, let alone that any deviation from a very tight version of it should require the sanction of three State legislatures. Much as I regret its inclusion, however, I do not believe that it warrants a refusal by the Congress to enact S. 1311. The same is true of that portion of paragraph A of article III which provides for selection of the

United States representative on the Yellowstone River Commission by the Director of the Geological Survey rather than by the President of the United States, that portion of paragraph D of the same article which purports to cast certain duties on specified Federal officials, and that portion of paragraph G of the same article which provides that the Yellowstone River Commission "shall have power to sue and be sued in its official capacity in any Federal court of the signatory States." All of these are matters which should properly be dealt with in Federal legislation rather than in a compact and the last may raise some interesting constitutional questions in the future.

As between the States of Wyoming and Montana – North Dakota being excepted in accordance with its wishes – the compact, in article III, is to be administered by a commission composed of a representative from Wyoming and a representative from Montana, each to be selected by the Governor in the manner that the State may choose, and, as I have already noted, one representative selected by the Director of the United States Geological Survey or whatever Federal agency may succeed to the functions and duties of that agency. The Federal official is to act as chairman of the commission, but he is not to vote except upon matters and points upon which the States' representatives may be in disagreement.

Generally, article III is in line with the over-all purpose of an interstate compact to employ the methods of negotiation and arbitration rather than that of adjudication in interstate disputes, the negotiation and arbitration methods being the more adaptable to changing conditions.

The remaining articles of the compact are those usual in such an instrument and do not call for specific comment.

From the advice that has been given to me, it is my belief that the apportionment agreed upon by the compact commission was entered into with due inquiry, that it is an honest exercise of judgment, and that it is equitable.

You have been advised by the Bureau of the Budget, I understand, that the Department of Justice recommends revision of S. 1311 to include provision that the Congress' consent to the Yellowstone compact "does not in any way subject the United States to the terms of the compact or affect its sovereignty, jurisdiction, power, authority, rights to the use of water, property, prerogatives, or responsibilities in, to, or over the Yellowstone River and its tributaries." The Bureau of the Budget has further advised that, subject to consideration by the Congress of certain other comments contained in its letter to you dated September 14, "there would appear to be no objection to enactment of S. 1311 if amended to assure the protection of the interests of the United States as recommended by the Department of Justice." I recommend enactment of S. 1311 with such amendments as are required in the light of the views expressed by Mr. Staats in the letter just referred to.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

Sincerely yours,

OSCAR L. CHAPMAN
Secretary of the Interior.

APPENDIX B

82D CONGRESS)	HOUSE OF (	REPORT
1st Session)	REPRESENTATIVES (	No. 1118

GRANTING THE CONSENT AND APPROVAL OF CONGRESS TO A COMPACT ENTERED INTO BY THE STATES OF MONTANA, NORTH DAKOTA, AND WYOMING RELATING TO THE WATERS OF THE YELLOWSTONE RIVER

OCTOBER 10, 1951. – Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. ENGLE, from the Committee on Interior and Insular Affairs, submitted the following

REPORT

[To accompany H. R. 3544]

The Committee on Interior and Insular Affairs, to whom was referred the bill (H. R. 3544) granting the consent and approval of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River, having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

The amendments are as follows:

AMENDMENTS TO H. R. 3544

Page 1, line 3, strike the following words: "and approval".

Page 1, line 3, after the word "of" insert the word "the".

Page 1, line 5, after the comma insert the words "which was".

Page 1, line 9, after the word "and" insert the words "which was".

Page 12, line 16, after the word "period" insert the word "from".

Page 20, line 20, place a period after the word "Chris" which appears in two places.

Page 21, line 1, strike the initial "R" and insert the initial "E".

Page 21, line 18, strike in two places the initial "K" and insert in two places the initial "E".

Page 22, line 2, strike in two places the initial "H" and insert in two places the initial "M".

Page 22, line 3, place quotation marks at the beginning of the paragraph.

Page 22, line 8, place quotation marks after the word "America".

Page 22, line 9, strike out the words "and repeal this act" and insert in lieu thereof "or repeal section 1 of this Act".

Page 22, line 10, after the period insert the following new sentence:

This reservation shall not be construed to prevent the vesting of rights to the use of water pursuant to applicable law and no alteration, amendment, or repeal of section 1 of this Act shall be held to affect rights so vested.

Amend the title so as to read as follows:

A bill granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River.

PURPOSE OF THE BILL

The negotiation of the Yellowstone River Basin compact was an important step toward full utilization of the waters of the Yellowstone River. The consent of the Congress to the compact entered into by the States of Montana, Wyoming, and North Dakota will be another forward move toward maximum beneficial use of these waters without unnecessary conflict between the States over the right to its use.

It has long been recognized that the maximum beneficial use of the water resources of the Yellowstone River in the Missouri River Basin is dependent upon the construction and operation of storage reservoirs. A plan for such reservoirs was set forth in Senate Document No. 191, Seventy-eighth Congress. If such a plan is to become a reality for the Yellowstone River Basin, construction of storage reservoirs will be required at sites at or near the Wyoming-Montana line so that the residual flows from Wyoming

can be controlled for use in the lower States of Montana and North Dakota.

Reasons for the Amendments

One of the reasons for the numerous amendments is to make H. R. 3544 conform to Senate bill 1311. Also, other amendments were made to correct H. R. 3544 so it reads exactly as the official copy of the compact adopted by the States.

Explantion of the Bill

Article V of the compact is the article that sets out the apportionment of the benefits of the water resources of the basin among the signatory States that they have agreed upon. Extensive studies by an engineering committee, appointed by the commission to advise it, disclosed that little could be gained, from a water-supply standpoint, by attempting, in the compact, the regulation and administration of existing appropriative rights in the signatory States. (The engineering committee comprised the State engineers of the three States and two Federal engineers from the Bureau of Reclamation and the Bureau of Indian Affairs.)

Accordingly, paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in

accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Paragraph B of article V is the core of the compact. The following analysis of this paragraph is made:

(1) The unused and unappropriated waters of the interstate tributaries only are treated – i.e., the waters that are residual to those required for the enjoyment of the appropriative rights that are recognized in paragraph A of article V.

(2) The supplemental water supplies that are needed for the better enjoyment of the rights recognized in paragraph A of article V are given a preferred status over water supplies for new projects.

(3) The water that is residual after the enjoyment of the rights in paragraph A of article V and after the furnishing of the supplemental water supplies to the projects with the rights recognized in paragraph A are allocated to Wyoming and to Montana in stated percentages. I am informed that these percentages were calculated, in accordance with the recommendation of the engineering committee, by dividing the total of the potential and possible acres in Wyoming and in Montana by the total of the potential and possible acres in both States.

In paragraph C of article V, there is adopted a modified version of the divertible flow principle. Under the formula adopted, the apportionments stated in paragraph B are made operative in terms of cumulative volumes of water throughout a water

year, fixed as October 1 of any year through September 30 of the succeeding year, in order to accommodate the new projects in the basin which must rely on storage water rather than on natural flow.

Considered with paragraph A of article V, paragraph D of article V gives to the lower Yellowstone Federal reclamation project in Montana and North Dakota the protection of a right existing on January 1, 1950. Additionally, paragraph D recognizes all rights to the beneficial use of water that existed in Montana and North Dakota on January 1, 1950, and that divert below Intake, Mont., and it permits the beneficial use of the flow of water of the Yellowstone River below Intake, Mont., on lands within Montana and North Dakota on a proportionate basis of acreage irrigated. This latter provision is important, particularly to North Dakota, because the flow of water of the Yellowstone River below Intake, Mont., will be residual water after the use of water above Intake, Mont. The flow will thus be not only a regulated flow, as a consequence of the construction and operation of the reservoirs at the strategic sites on the Big Horn River, the Tongue River, and the Powder River, but it will also include the return flows that are certain to appear below Intake, Mont., with the expansion of irrigation after storage water becomes available. The sharing of this residual flow by Montana and North Dakota, on a proportionate basis of acreage irrigated, will keep the new developments in the two States in balance and minimize future interstate disputes.

The inclusion in paragraph E of article V of special provisions relating to stock water ponds and

to "devices and facilities for the control and regulation of surface waters" is a recognition of the importance of stock raising and modern soil conservation practices in the economy of the area. Neither of these items will adversely affect existing Federal projects in the basin. Item 2 of paragraph E, moreover, recognizes and rests upon the distinction between surface waters and appropriable waters. In other words, waters which diffuse over the land and do not flow intermittently or continually through and into natural water courses are permitted, so far as the compact is concerned, to be controlled and regulated by devices and facilities installed by the owner of the land on which such waters are diffused.

Paragraph F of article V amounts to a recognition that the allocations made in article V may have to be reconsidered from time to time so that they can be made to conform to demonstrated experience where that proves to be at variance with the calculated belief, such belief necessarily governing the allocations in the first instance.

Articles VII, VIII, and IX implement the use of allocations made in article V. Of particular interest is the provision in article VII expressly permitting diversions to be made and structures to be erected in one State for the benefit of users in another. The inclusion of this provision is in harmony with the decision of the Supreme Court in *Weiland* v. *Pioneer Irrigation Co.* (259 U.S. 498 (1922)). Also of importance is the phrasing of article VII, paragraph D, which, while providing that the use of allocated waters on Federal projects constructed after the date

of the compact shall be charged to the State in which the water is used, does not attempt to limit the use of water in any of the States of the basin by the Federal Government.

Generally, article III is in line with the over-all purpose of an interstate compact to employ the methods of negotiation and arbitration rather than that of adjudication in interstate disputes, the negotiation and arbitration methods being the more adaptable to changing conditions.

The remaining articles of the compact are those usual in such an instrument and do not call for specific comment.

Rights of the United States are Protected

The compact provides that its operation shall not "impair or affect the sovereignty or jurisdiction of the United States of America in and over the area of waters affected" by it or "any rights or powers of the United States of America, its agents, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin" or its capacity to acquire such rights, that it shall not be taken to "subject any property of the United States of America its agencies, or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the compact," and that its terms do not cover "waters within or waters which contribute to the flow of streams within the Yellowstone National Park." The compact, moreover, provides that

its terms shall not "be so construed or interpreted as to affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations." The water rights of the Indians were reserved by the Indians at the time of the creation of the respective reservations by the treaties entered into by the Indians with the United States. These Indian water rights have been recognized by the Supreme Court of the United States. The most important decision is the case of *Winters* v. *United States* (reported in 207 U.S. 564). This situation explains the inclusion of the language just quoted. A further safeguard to Federal interests is to be found in section 2 of H. R. 3544 – i.e., in the express reservation to Congress of its right to alter, amend, or repeal the act.

The favorable report of the Department of the Interior reads as follows:

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY
Washington, D.C., September 27, 1951.

Hon. JOHN R. MURDOCK,
Chairman, Committee on Interior and Insular Affairs,
House of Representatives, Washington, D.C.

MY DEAR MR. MURDOCK: I have for report H. R. 3544, a bill granting the consent and approval of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming, relating to the waters of the Yellowstone River. The compact, as approved by the 1951 legislative assemblies of the signatory States, is set out in the subject bill.

One very important part of the plan of this Department for improvements in the Missouri River Basin set forth in Senate Document No. 191, Seventy-eighth Congress, and approved and authorized for construction in the acts of December 22, 1944 (58 Stat. 887, 891), and July 24, 1946 (60 Stat. 641, 653), is that of supplying new and supplemental water for the irrigation of well over 700,000 acres of land in the Yellowstone River Basin, the installation in that basin of more than 300,000 kilowatts of hydroelectric generating capacity, and provision of reservoirs for these and other purposes with a total capacity of more than 4,250,000 acre-feet. While these figures cannot be regarded as final, they are indicative of the great importance of that basin to the economy of the entire Missouri River Basin and of the Nation. The negotiation of the Yellowstone River Basin compact was, and the Congress' consent to it will be, an important step toward permitting realization of the basin's potentialities without bickering between the States.

The compact provides that its operation shall not "impair or affect the sovereignty or jurisdiction of the United States of America in and over the area of waters affected" by it or "any rights or powers of the United States of America, its agents, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin" or its capacity to acquire such rights, that it shall not be taken to "subject any property of the United States of America, its agencies, or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the compact," and that its terms do not cover "waters within or waters which contribute to the flow of streams within the Yellowstone

National Park." The compact, moreover, provides that its terms shall not "be so construed or interpreted as to affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations." The water rights of the Indians were reserved by the Indians at the time of the creation of the respective reservations by the treaties entered into by the Indians with the United States. These Indian water rights have been recognized by the Supreme Court of the United States. The most important decision is the case of *Winters* v. *United States* (reported in 207 U.S. 564). This situation explains the inclusion of the language just quoted. A further safeguard to Federal interests is to be found in section 2 of H. R. 3544 – i.e., in the express reservation to Congress of its right to alter, amend, or repeal the act.

It has long has been recognized that the fuller use of the water resources of the Yellowstone River Basin contemplated in Senate Document No. 191 is dependent entirely upon the construction and operation of storage reservoirs to regulate and conserve the water yields of the principal streams of the basin. These streams, in addition to the Yellowstone River itself, are its four large interstate tributaries, each rising in Wyoming and flowing into Montana: The Clark's Fork, Yellowstone River; the Big Horn River; the Tongue River; and the Powder River. Of these streams, the Yellowstone River, which is the main stem of the river system of the Yellowstone Basin, needed little consideration in the negotiation of the compact because it is almost entirely in Montana and its water yield seems to be adequate for any program

of feasible developments along its course, and the Clark's Fork, Yellowstone River, one of the tributaries, is not likely to experience water shortages. Hence, the problem streams are the three remaining large interstate tributaries. The elements that make these interstate tributaries problem streams are the existing irrigated developments and the potential and possible irrigated developments. (In this connection, I am advised that the compact commissioners recognized a distinction between potential developments and possible developments. Potential developments are those which, it was thought, are definitely feasible, while possible developments are those which could be developed only at a very high cost or for which a water supply seemed questionable.)

The practical accomplishment, in the circumstances, of an equitable apportionment of the benefits of the waters of the Yellowstone River system among the States of Wyoming, Montana, and North Dakota will require the construction, at strategic sites, at or near the Wyoming-Montana State line, of storage reservoirs so that the residual flows from Wyoming can be controlled and conserved for use in the lower States of Montana and North Dakota. Fortunately, such strategic reservoir sites are available on the Big Horn River, the Tongue River, and the Powder River.

Article V of the compact is the article that sets out the apportionment of the benefits of the water resources of the basin among the signatory States that they have agreed upon.

Extensive studies by an engineering committee, appointed by the Commission to advise it, disclosed that little could be gained, from a water-supply standpoint, by attempting, in the compact, the regulation

and administration of existing appropriative rights in the signatory States. (The engineering committee comprised the State engineers of the three States and two Federal engineers from the Bureau of Reclamation and the Bureau of Indian Affairs.) Accordingly, paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Paragraph B of article V is the core of the compact. The following analysis of this paragraph is made:

(1) The unused and unappropriated waters of the interstate tributaries only are treated – i.e., the waters that are residual to those required for the enjoyment of the appropriative rights that are recognized in paragraph A of article V.

(2) The supplemental water supplies that are needed for the better enjoyment of the rights recognized in paragraph A of article V are given a preferred status over water supplies for new projects.

(3) The water that is residual after the enjoyment of the rights in paragraph A of article V and after the furnishing of the supplemental water supplies to the projects with the rights recognized in paragraph A are allocated to Wyoming and to Montana in stated percentages. I am informed that these percentages were calculated, in accordance with the recommendation of the

engineering committee, by dividing the total of the potential and possible acres in Wyoming and in Montana by the total of the potential and possible acres in both States.

In paragraph C of article V, there is adopted a modified version of the divertible flow principle. Under the formula adopted, the apportionments stated in paragraph B are made operative in terms of cumulative volumes of water throughout a water year, fixed as October 1 of any year through September 30 of the succeeding year, in order to accommodate the new projects in the basin which must rely on storage water rather than on natural flow.

Considered with paragraph A of article V, paragraph D of article V gives to the lower Yellowstone Federal reclamation project in Montana and North Dakota the protection of a right existing on January 1, 1950. Additionally, paragraph D recognizes all rights to the beneficial use of water that existed in Montana and North Dakota on January 1, 1950, and that divert below Intake, Mont., and it permits the beneficial use of the flow of water of the Yellowstone River below Intake, Mont., on lands within Montana and North Dakota on a proportionate basis of acreage irrigated. This latter provision is important, particularly to North Dakota, because the flow of water of the Yellowstone River below Intake, Mont., will be residual water after the use of water above Intake, Mont. The flow will thus be not only a regulated flow, as a consequence of the construction and operation of the reservoirs at the strategic sites on the Big Horn River, the Tongue River, and the Powder River, but it will also include the return flows that are certain to appear below Intake, Mont., with the expansion of

irrigation after storage water becomes available. The sharing of this residual flow by Montana and North Dakota, on a proportionate basis of acreage irrigated, will keep the new developments in the two States in balance and minimize future interstate disputes.

The inclusion in paragraph E of article V of special provisions relating to stock water ponds and to "devices and facilities for the control and regulation of surface waters" is a recognition of the importance of stock raising and modern soil conservation practices in the economy of the area. Neither of these items will adversely affect existing Federal projects in the basin. Item 2 of paragraph E, moreover, recognizes and rests upon the distinction between surface waters and appropriable waters. In other words, waters which diffuse over the land and do not flow intermittently or continually through and into natural water courses are permitted, so far as the compact is concerned, to be controlled and regulated by devices and facilities installed by the owner of the land on which such waters are diffused.

Paragraph F of article V amounts to a recognition that the allocations made in article V may have to be reconsidered from time to time so that they can be made to conform to demonstrated experience where that proves to be at variance with the calculated belief, such belief necessarily governing the allocations in the first instance.

Articles VII, VIII, and IX implement the use of allocations made in article V. Of particular interest is the provision in article VII expressly permitting diversions to be made and structures to be erected in one State for the benefit of users in another. The inclusion of this provision is in harmony with the

decision of the Supreme Court in *Weiland* v. *Pioneer Irrigation Co.* (259 U.S. 498 (1922)). Also of importance in the phrasing of article VII, paragraph D, which, while providing that the use of allocated waters on Federal projects constructed after the date of the compact shall be charged to the State in which the water is used, does not attempt to limit the use of water in any of the States of the basin by the Federal Government.

I regret the spirit of localism that induced the inclusion in article X of a provision that "No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States." Though I agree that preference in the use of water resources ought generally to be given to the basin of origin, it is hard for me to believe that this is more than a generally desirable rule, let alone that any deviation from a very tight version of it should require the sanction of three State legislatures. Much as I regret its inclusion, however, I do not believe that it warrants a refusal by the Congress to enact H. R. 3544. The same is true of that portion of paragraph A of article III which provides for selection of the United States representative on the Yellowstone River Commission by the Director of the Geological Survey rather than by the President of the United States, that portion of paragraph D of the same article which purports to cast certain duties on specified Federal officials, and that portion of paragraph G of the same article which provides that the Yellowstone River Commission "shall have power to sue and be sued in its official capacity in any Federal court of the signatory States." All of these are matters which should properly be dealt with in Federal legislation

rather than in a compact and the last may raise some interesting constitutional questions in the future.

As between the States of Wyoming and Montana – North Dakota being excepted in accordance with its wishes – the compact, in article III, is to be administered by a commission composed of a representative from Wyoming and a representative from Montana, each to be selected by the Governor in the manner that the State may choose, and, as I have already noted, one representative selected by the Director of the United States Geological Survey or whatever Federal agency may succeed to the functions and duties of that agency. The Federal official is to act as chairman of the commission, but he is not to vote except upon matters and points upon which the States' representatives may be in disagreement.

Generally, article III is in line with the over-all purpose of an interstate compact to employ the methods of negotiation and arbitration rather than that of adjudication in interstate disputes, the negotiation and arbitration methods being the more adaptable to changing conditions.

The remaining articles of the compact are those usual in such an instrument and do not call for specific comment.

From the advice that has been given to me, it is my belief that the apportionment agreed upon by the compact commission was entered into with due inquiry, that it is an honest exercise of judgment, and that it is equitable.

I invite your committee's attention to two minor differences between H. R. 3544 and S. 1311, its Senate companion. In line 3, page 1, of H. R. 3544, the "consent and approval" of the Congress is given to the

compact; in line 3, page 1, of S. 1311, the "consent" of the Congress is given. The latter follows the language of the Constitution, and is therefore, I believe, to be preferred. Section 2 of H. R. 3544 merely states an express reservation of the Congress' right to alter, amend, or repeal the act; section 2 of S. 1311 couples this with a declaration that "This reservation shall not be construed to prevent the vesting of rights to the use of water pursuant to applicable law and no alteration, amendment, or repeal of section 1 of this act shall be held to affect rights so vested." Though I believe that this additional language is not strictly necessary, it will, I believe, serve to allay doubts and fears. I, therefore, recommend that section 2 of H. R. 3544 be amended to conform to the language adopted in section 2 of S. 1311.

I have been advised by the Bureau of the Budget, in connection with S. 1311, that the Department of Justice recommends revision of the bill to include provision that the Congress' consent to the Yellowstone compact "does not in any way subject the United States to the terms of the compact or affect its sovereignty, jurisdiction, power, authority, rights to the use of water, property, prerogatives, or responsibilities in, to, or over the Yellowstone River and its tributaries." I have been further advised by the Bureau of the Budget that, subject to consideration by the Congress of certain other comments contained in a letter dated September 14 from its Acting Director to Senator O'Mahoney, a copy of which is attached, "there would appear to be no objection to enactment of S. 1311 if amended to assure the protection of the interests of the United States as recommended by the Department of Justice." This advice is,

I believe, equally applicable to H. R. 3544, the enactment of which I recommend with such amendments as are required in the light of the views expressed by Mr. Staats in the letter just referred to.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

Sincerely yours,

OSCAR L. CHAPMAN
Secretary of the Interior

Enclosure.

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET,
Washington, D.C., September 11, 1951

Hon. JOSEPH C. O'MAHONEY
United States Senate, Washington, D.C.

MY DEAR SENATOR O'MAHONEY: Receipt is acknowledged of your letter dated April 12, 1951, requesting our report on S. 1311, a bill granting the consent of Congress to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the waters of the Yellowstone River.

In response to my request for the views of the Department of Justice, the Deputy Attorney General indicates that while article XVI of the compact is apparently designed to protect the interests of the United States, the language used is rather ambiguous. The preservation of the rights of the United States is rendered somewhat obscure due to the possible conflicting interpretations of the terminology "area of waters" in the language "To impair or affect

the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such compact, any rights or powers of the United States of America, its agencies, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin nor its capacity to acquire rights in and to the use of said waters."

He also calls attention to article V, B, of the compact under which the signatory States allot themselves all "unused and unappropriated waters of the interstate tributaries of the Yellowstone River" as possibly depriving the United States of the use of surplus water it has been anticipated would flow into the Missouri River.

Also in the Deputy Attorney General's opinion, the broad authority contained in the provision that the commission may sue and be sued might he construed, in view of the Federal representative thereon, to indicate that the Federal Government has waived its sovereign immunity from suit.

Finally, he recommends that in the event Congress should desire to approve the compact as drafted, such approval be essentially in the following language:

"*Be it enacted by the Senate* and *House of Representatives of the United States of America in Congress assembled*, That approval by the Congress is hereby given to the Yellowstone River Compact: *Provided, however*, That this approval of the Compact does not in any way subject the United States to the terms of the Compact or affect its sovereignty, jurisdiction, power, authority, rights to the use of water, property, prerogatives, or responsibilities in, to, or over the Yellowstone River and its tributaries."

The Secretary of the Interior, in his proposed report on H. R. 3544, the companion bill to S. 1311, expresses the opinion that the provisions in the compact for the selection of the Federal representative by the Geological Survey rather than the President and that the commission should be subject to suit are regrettable and that the latter "may raise some interesting constitutional questions in the future."

Similarly, conflicting provisions appearing in previously consummated compacts prompted the President on May 3, 1950, to write the Federal representatives on various compact commissions cautioning them to exert all efforts to eliminate or correct the areas of possible conflict which might impose restrictions on the use of waters by the United States.

This office is in agreement that the compact method is the proper and logical manner for States to allocate the waters of interstate streams. It is essential, however, that such compacts include adequate provisions to preserve the rights and interests of the United States and for appointment by the President of a Federal representative as a member of the compact commission. Since the Yellowstone River compact which would be approved by S. 1311 has been ratified by the States of Montana, North Dakota, and Wyoming, it may not now be feasible of revision to provide for the selection of the Federal representative by the President rather than by Geological Survey. While I believe that as a general rule the former is preferable, there may be some question whether in this case the resubmission of the compact to the States to provide for selection of a Federal representative by the President rather than by Geological

Survey is justified. It is of fundamental importance, however, that the compact protect the rights and interests of the United States in these waters. The language of the proposed amendment to the bill prepared by the Department of Justice would seem to provide such protection. Accordingly, subject to the consideration of the above comments by the Congress, there would appear to be no objection to enactment of S. 1311 if amended to assure the protection of the interests of the United States as recommended by the Department of Justice.

Sincerely yours,

ELMER B. STAATS, *Acting Director.*

The Committee on Interior and Insular Affairs unanimously recommends the enactment of H. R. 3544.

APPENDIX C

*Minutes of the Meeting of the

YELLOWSTONE RIVER COMPACT COMMISSION

Held in the Chamber of
Commerce Building, Billings, Montana

October 10, 1940

(The statements as given in these minutes are not verbatim, except as indicated by quotation marks)

Commissioner Clyde L. Seavey of the Federal Power Commission opened the meeting at 10:00 a.m. and asked Mr. Wing to make a statement covering the work of the Compact Commission to date.

Mr. Wing: Two previous meetings of the Compact Commission have been held. The first was held at Billings, Montana on May 5, 1938, and the second, at Thermopolis, Wyoming on November 21 and 22, 1938. The first meeting was held for the purpose of determining the information needed for drafting the Compact and how it might best be obtained. It soon became obvious that insufficient information regarding present and potential uses of water was available and that it would require considerable time in which to gather it.

At the meeting in Thermopolis a report was presented which contained such

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* As revised December 20, 1940, in accordance with corrections submitted by those in attendance.

information as had been collected up to that time. Based on this information, a "progress report" was drafted for submission to the State legislatures and to the Congress. Subsequent to the submission of this progress report, Congress passed an amendment to the act extending the time for the drafting of the compact, and also included North Dakota as a party to any agreement that might be entered into.

In addition to the data secured by the Compact Commission, information relating to existing and potential irrigation development in the Yellowstone Basin has also been compiled by the National Resources Planning Board. This information was compiled in the Omaha District Office of the U. S. Engineer Department under the direction of Lt. Col. W. M. Hoge. This information was subsequently made available to the Compact Commission and, to a large extent, has been incorporated in its latest revised report. Since the meeting at Thermopolis, the U. S. Bureau of Reclamation also has begun a survey of the irrigated and irrigable areas in the Big Horn Basin and in portions of the Yellowstone Basin above Billings. Additional and up-to-date information relating to irrigated lands and priorities of water-use is also being collected under the sponsorship of the Montana State College and the Montana Water Conservation Board. Mr. Donohue will presently submit a report of the work done by Montana. The U. S. Bureau of the Census has completed its decennial census of irrigation. The report of this census, which will be available in 1941, should contain data of value to the Compact Commission.

Such data as are now available have been compiled by the Federal Power Commission in a report that is now in draft form. It plans to submit the report in the near future to the members of the Compact Commission for their information and criticism.

Mr. Seavey: "Up to what date does the report cover?"

Mr. Wing: The report has been kept up to date insofar as possible. The Army has made a new survey, but this information has not yet been made available. Perhaps Colonel Hoge could tell more about it.

Col. Hoge: A new report of the Yellowstone Basin has been finished but has not yet been released.

Mr. Wing: "Were there many revisions?"

Col. Hoge: "Yes, there were revisions of the irrigable areas, but no further studies of water use have been made."

Mr. Simmons: The Indian Service is making a study of water use on the Big Horn.

Mr. Hanna: The Indian Service has already submitted figures on areas that are irrigated in Indian projects. These figures were gathered from the projects shortly after the last Compact Commission meeting. A new survey of irrigated and irrigable land is now in progress on the Big Horn. This survey is a check on water available and water use. It covers the Wind River Reservation and Crow Reservation.

Mr. Simmons: A major problem of the compact is the water rights of irrigable lands on the Crow Reservation in Montana, and the Wind River Reservation in Wyoming. At the first meeting of the Compact Commission, the case of United States vs. Powers over the waters of the Little Horn was discussed. In this case the United States, on behalf of its Indian wards and project water users, brought suit against individual irrigators not under Government ditches. The court decided that all landowners, whites and Indians alike, had treaty rights to irrigate all of their lands that were susceptible of irrigation. These rights date from the time of the treaty. Such rights are senior in the basin and may be taken up at any time in so far as Indian owned lands are concerned. There are thousands of acres in the Crow and Wind River Reservations that have never been irrigated. What would be the situation if these lands were brought under irrigation under the Powers decision? (59 S.Ct.R. 344). On the Crow and the Wind River Reservations about 75 percent of the lands are owned by Indians and about 25 percent by whites. The Indian lands cannot, under present laws, be alienated.

The subject of reservoirs came up, and, since the Boysen project was mentioned, Mr. Wing asked Colonel Hoge if he could give any information on this project.

Col. Hoge: Representatives of both Montana and Wyoming have had an opportunity to examine the report and somehow it managed to get into the newspapers. The review of the 308 Report is not as detailed as is generally believed. It

is concerned principally with flood control, and those tributaries having no flood control features were not examined thoroughly. Reservoir sites were examined and evaluated. It was concluded that the Lower Canyon site, the Boysen site, the upper and lower Big Horn Canyon sites and the Moorhead site were the best sites available. Water supply and foundations were studied. The report recommended that a dam be constructed on the Big Horn, but left the decision as to the site to the Chief of Engineers. The Boysen reservoir would have a capacity of about 3,000,000 acre-feet, and the lower Big Horn Canyon site would have a capacity of from 1,500,000 to 2,000,000 acre-feet. The other feasible sites included the Yankee Jim Canyon site, but the Big Horn sites were considered better. The general conclusion was that there was surplus of water that could be stored and used for irrigation and other purposes.

At a Denver meeting of the National Resources Planning Board about a year ago it was agreed that if state and other agencies would submit new information to the Omaha office, the Engineer Office would compile it and keep the data up to date. So far we have received no additional information since the first was gathered.

Mr. Wing: "Mr. Sloan, will you make a statement on the work the Bureau is conducting?"

Mr. Sloan: The Bureau of Reclamation is trying to carry on where other agencies left off. It is attempting to make a complete survey of the Yellowstone basin in order to determine the best use for water, not only for irrigation, but for other

purposes as well. The survey includes portions of the upper Missouri River basin, and follows down the main stem of the Missouri to the humid zone. The problem is more involved than had been anticipated. All areas that are potentially irrigable are being investigated, without careful study of the water supply, in order to find those projects which merit more detailed study. An attempt is being made to avoid duplicating work that has been done before, and data furnished by other agencies is used whenever it is available. For example, the Indian Service data has been used without checking.

The survey on the Big Horn is progressing. The work on the upper Wind River is about 70 percent complete. On the Yellowstone below Billings the survey is practically finished. On the main stem above Billings the work is almost 100 percent complete, but the work on the tributaries and on possible tie-ins with the Missouri, is far from finished. With adequate storage, the water supply on the main stem of the Yellowstone and on the Big Horn is ample for the needs of the irrigable area, although this is not true of a number of the tributaries. On the Tongue and Powder the situation is quite different. The water supply even with storage, is not sufficient to irrigate all the land susceptible of irrigation. The problem is further complicated by the maze of interstream diversions, by a wide choice of reservoir sites, and by the fact that the Wyoming portion of the basin is highly developed whereas the Montana portion has been developed to a minor degree.

Mr. Wing: "Will the report of the survey be made available within a year?"

Mr. Sloan: "Yes. It is best not to give out information until all the data are available. The best use of the water cannot be found until all of the possibilities have been investigated."

Mr. Brown: "Are you tabulating data on priorities in your survey?"

Mr. Sloan: "No."

Mr. Brown: "In my opinion that is the crux of the matter."

Mr. Sloan: "I don't think so. The problem is to provide an adequate supply by storage. With an adequate water supply, there is no problem of priorities."

Mr. Wing: Storage is going to be the answer to additional irrigation, but a tabulation of water rights should be made available if possible.

Mr. Brown: Montana is tabulating all of the priorities on the streams that have been adjudicated, and those that have been entered in the county records. This survey is an outgrowth of the Thermopolis meeting. We are getting information on the capacity of the ditches, irrigated acres, and dates of filings. This information is very necessary, and some agency should devote itself to the task of collecting it.

Mr. Wing asked Mr. Donohue if his report was ready. Mr. Donohue read and submitted a progress

report of the work done by Montana since 1938. A copy of this report is attached.

Mr. Monson: No systematic, up to date, record of water rights has been kept in Montana. They have accumulated over a period of about 75 years, from partial records kept in each county of the water filings in that county; but these records do not take into account appropriations from the same stream or its tributaries in other counties.

It has been said that because of exaggerated statements these filings, or records of appropriation, are of little or no value. But when the water rights on any stream are adjudicated the filings are very valuable in determining one of the most important facts pertaining to water rights, viz. the priority.

It is true that where the supply is adequate for the needs of all users priority of right may not be especially important, particularly if the amount of water available from the normal flow of the stream is adequate for all purposes. Indeed if such were the case we might forget the problem of water rights altogether. But if the available supply is insufficient for all uses, the questions of priority and of beneficial use both become very important. This is also true if part of the supply is derived from storage. Certainly those who are paying for the construction of reservoirs will not consent to the turning of the stored waters back into the stream for the benefit of other water users, who do not share in the cost of providing storage.

The project we have undertaken consists, among other things, of preparing a complete tabulation of all water rights on record in the state, and also of appropriations not covered by formal filing. Progress up to date consists in the transcribing of existing records in nearly all counties. The next step is to have these records verified by the water users themselves and to record other pertinent information which will bring the record up to date. It is planned to hold meetings or hearings in each county, at which water users will have an opportunity to examine and verify the existing record or to file a complete record covering rights not recorded at present. It is anticipated that this will involve a great deal of work.

Mr. Wing: When do you estimate that this work will be finished?

Mr. Monson: In one year, perhaps. We are concentrating on the counties in the Yellowstone Basin.

Mr. Wing asked for a report from Wyoming.

Mr. Bishop: Mr. Sloan has covered our progress in his report. Montana and Wyoming could cooperate on the Boysen dam. It would settle for all time the water problem on the Big Horn, including the silt problem.

Mr. Wing asked for a report from North Dakota.

Mr. McColly: Most of the acreage in North Dakota is in the Lower Yellowstone Project. The water rights for the other small projects are filed in the State Engineer's office.

Mr. Wing asked North Dakota to supply the same information that the other states had filed.

At Mr. Wing's request, Judge Stone discussed at some length the problems which confronted the states in making a compact, illustrating his points with examples from other basin compacts.

Mr. Stone: It is of the utmost importance to have all of the available information at the disposal of the Compact Commission. Most errors of past compacts can be traced to inadequate information at the time they were drafted. The Supreme Court has declared that decreed rights must give way when they exceed a state's equitable share of the stream. All factors must be considered in arriving at an equitable division between states, in order to avoid litigation years from now. Litigation is extremely expensive and must be avoided. The compact method is the best method of avoiding litigation. There should not be great concern over delay in the compact, for litigation is much slower. One law suit breeds another, and litigation, once started, never ceases.

Mr. Borwn [sic] reiterated that water right priorities were of great importance, and requested the Bureau of Reclamation to include them in its survey, if possible.

Mr. Simmons: The question arises as to who will pay for storage. The early rights are not interested in storage because they are entitled to receive adequate water.

Mr. Wing asked the Wyoming delegation if Wyoming would accept the water right priorities now being compiled by Montana. Mr. Bishop replied that Wyoming preferred to wait until the Bureau of Reclamation survey was finished, and suggested that a representative from Wyoming sit in on the county hearings to be held in Montana.

Mr. Brown: We are attempting to get only such facts as would be admitted as evidence before a court if there were actual litigation. If Wyoming will not accept the data we are collecting, the survey is a waste of money.

Mr. Searey: Do any other agencies have any information to present? If not, I suggest we recess for lunch, and that during the recess each state hold a caucus to determine whether or not the data on water rights now being collected by Montana will be accepted. If this evidence is accepted, it will not be necessary to wait until adjudications are made.

This procedure was agreed upon and the meeting recessed until 3:00 p.m.

Afternoon Session

Mr. Searey: Have the gentlemen from each state been able to reach an agreement among themselves?

Mr. Metz: To sum up – in order to make a compact that shall last for all time, two problems must be solved. They are, first, the condition

which prevails today, and, second, the future situation. Wyoming suggests that the actual beneficial use now made of water be declared the principal factor in dividing the water to meet the needs of the situation as it is today. Actual use of water on land is of more importance than priorities or court decrees. Wyoming will give full faith and credit to the surveys the Montana Board is now making, and will not take advantage of its superior position on water-right filings. Expert surveys must be made by a competent agency to determine water use, water supply, and potential areas. Wyoming is willing to accept the finding of the Bureau of Reclamation. For the future, the division of water should be made with regard to the potential uses in the basin. This involves:

1. Soil study
2. Type of agriculture
3. Population
4. Cost of irrigation

Some competent authority should make a survey of the irrigable land in the basin, and determine how much water would be required to irrigate it. If there is not enough water for all the land, the less desirable projects should be eliminated without regard to state lines. Some agency, such as the Bureau of Reclamation, should decide on the average duty of water for all the potential lands, and then the water could be divided equally on the basis of the number of acres in each state. Wyoming is willing to accept the Bureau of Reclamation's estimate for the water duty.

Mr. Seavery: Do I understand that you went the Bureau to determine an average use of water for all potential lands, without regard to state lines, and that the states will divide the water among themselves on the basis of potential area in each state?

Mr. Metz: Yes. That the water be divided between the states proportionately to the irrigable area. It would be a mass allocation, and each state could distribute its share as it pleases.

Mr. Bishop: If an upper state promises a lower state a definite amount, the upper state will suffer in a dry year. The water available each year must be divided proportionately each year.

Mr. Brown: There is going to be an interval before storage can be developed when shortages will occur, and consideration must be given to existing priorities during this interval. Our legislature is not going to enter into a compact that does not protect the priorities of the irrigators.

Mr. Wing: May I suggest that the present supply in the dry years be divided on the basis of present use, and that storage water and surplus water in wet years be divided on the basis of the number of potential acres in each state.

Mr. Metz: Yes. We must not foreclose the future of any state in our endeavor to alleviate the present condition.

Mr. Brown: That's true. No one is going to sign a compact that closes the future.

There followed a discussion on reservoir sites on the Big Horn, but it was agreed that it was not the duty of the Compact Commission to recommend reservoir sites to the Army Engineers.

There was a discussion of the desirability of submitting a progress report to the legislatures.

There followed a discussion of Indian rights, particularly of the fear that the states might be "haggling over someone elses' bone". The Indian lands are a minor portion of the entire basin but have prior rights.

Mr. Scavey: I asked the Secretary of the Interior to appoint someone to represent the Indians. The Office of Indian Affairs is making a survey of the needs of the Indians, and will submit a report of the findings to the Compact Commission.

Mr. Wing: It might be well to include in the compact a clause providing for subsequent rights of the Indians.

Mr. Metz requested Judge Stone to make available to the Compact Commission copies of the Rio Grande and La Plata Compacts. Judge Stone agreed to send them this material, together with copies of the proceedings.

Mr. Scavey: "Then is it agreed that Montana go ahead with its survey of water rights as planned?"

Mr. Metz: "Yes for Wyoming."

Mr. Whitney: "It is agreeable with North Dakota."

Mr. Seavey: Since Montana is including information of the actual use of water at present in its survey, would Wyoming and North Dakota be willing to collect this information in their states to supplement the water right filings?

Mr. Metz: I cannot speak definitely for the State Engineer[1], but I believe that Wyoming would rather accept the Bureau of Reclamation survey of water use. The water use in Wyoming is less than the decreed appropriations.

Mr. Whitney: We will cooperate to the fullest extent possible and get as much information as we can.

Mr. Wing: When this work was initiated two years ago we prepared an outline which each state was to follow in collecting data. We will send a copy of the outline to North Dakota.

There followed a discussion on the type of progress report that should be prepared. It was agreed that the Federal Power Commission would submit to each state copies of the report which it now has in draft form. Each state would be requested to criticize the report and to make any necessary corrections. It might then be found advisable to submit an abridged report to the state legislatures in order to keep them informed of the general direction of the negotiations. An effort will be made to have the abridged report prepared by January 1941.

---

[1] Mr. Bishop was not present at this time.

The meeting adjourned at 4:30 p.m.

A list of those attending the meeting is given on the following page.

Name	Organization and Title	Address
Clyde L. Seavey	Member, Federal Power Commission	Washington, D. C.
E. B. Winter	Montana Member, Compact Commission	Miles City, Montana
H. F. McColly	Secretary and Chief Engineer, North Dakota Water Conservation Comm.	Bismarck, N. D.
Frank P. Whitney	N. D. Member, Compact Commission	Dickinson, N.D.
Lt. Col. Wm. M. Hoge	District Engineer, U.S. Engineer Department	Omaha, Nebraska
W. G. Sloan	U. S. Bureau of Reclamation	Denver, Colorado
H. M. Tice	Assistant State Engineer	Helena, Montana
J. W. Emmert	Yellowstone National Park	Yellowstone Park
Wesley A. D'Evart	Montana Member, Compact Commission	Wilsall, Montana
E. Walter Hunke	State Supervisor, W.P.A. Research Projects	State College, Bozeman, Montana

O. W. Monson	Montana State College	Bozeman, Montana
Carl G. Krueger	Forest Supervisor, Shoshone National Forest	Cody, Wyoming
Clifford H. Stone	National Resources Planning Board	Denver, Colorado
L. A. Campbell	Forest Service, Region 1	Missoula, Montana
Walter L. Schipull	Forest Service, Region 2	Denver, Colorado
Fred E. Buck	Secretary, Montana State Planning Board	Helena, Montana
L. C. Bishop	Wyoming State Engineer and Wyoming Inter-state Streams Commissioner	Cheyenne, Wyoming
E. B. Donohue	Montana Member, Compact Commission	Helena, Montana
C. J. Dousman	Attorney, Montana Water Board	Helena, Montana
R. G. Lyman	W.P.A. District Supervisor, Water Resources Projects	
Rockwood Brown	Montana Water Board and member of Compact Commission	Billings, Montana

L. F. Thornton	Member, Wyoming Planning and Water Conservation Board; Member, Compact Commission	Thermopolis, Wyo.
Will G. Metz	Wyoming Member, Compact Commission	Buffalo, Wyo.
Kenneth R.L. Simmons	District Counsel, Indian Service	Billings, Montana
W. S. Hanna	District Engineer, Indian Service	Billings, Montana
J. C. Cory	W.P.A.	Butte, Montana
O. Leon Anderson	Area Conservationist, Soil Conservation Service	Billings, Montana
Edgar Reeves	State Coordinator, Soil Conservation Service	Laramie, Wyoming
L. S. Wing	Federal Power Commission	Denver, Colorado
H. O. Caperton	Federal Power Commission	Denver, Colorado

Submitted by: H.O. Caperton, Federal Power Commission, Secretary of the Meeting.

No. 137, Original

In The Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

MONTANA'S EXCEPTION AND BRIEF

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May 2010

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MONTANA'S EXCEPTION

The State of Montana excepts to the First Interim Report of the Special Master with respect to the following conclusions on Wyoming's Motion to Dismiss:

1. That Montana has no claim under the Yellowstone River Compact for Wyoming's depletion of flows on which Montana depended at the time of the Compact, where those depletions result from new consumption of irrigation water on lands in Wyoming that were being irrigated at the time of the Compact; and

2. That Wyoming's Compact obligations are contingent upon Montana's actions.

Respectfully submitted,

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STATE OF MONTANA,

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Of The Special Master

BRIEF IN SUPPORT OF MONTANA'S EXCEPTION

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Hinderlider v. La Plata River & Cherry Creek Co., 304 U.S. 92 (1938) .....*passim*

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Kansas v. Nebraska & Colorado, 530 U.S. 1272 (2000) 15, 16

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Nebraska v. Wyoming, 325 U.S. 589 (1945) 33

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New Jersey v. New York, 523 U.S. 767 (1998) 12, 19

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Republican River Compact, 57 Stat. 86 (1943).....15

Yellowstone River Compact, 65 Stat. 663 (1951).....*passim*

OTHER AUTHORITIES

2B Sutherland Statutory Construction § 50:1 (7th ed.) 27

David H. Getches, Water Law in a Nutshell (Thomson/West 2009).....34, 35

Frank J. Trelease, *Reclamation Water Rights*, 32 Rocky Mtn. Min. L. Inst. 464 (1960) 34

Joseph L. Sax, Barton H. Thompson, Jr., John D. Leshy and Robert H. Abrams, Legal Control of Water Resources (Thomson/West 2006).....35, 36

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INTRODUCTION

This case seeks to enforce the Yellowstone River Compact ("Compact") with respect to the Tongue and Powder Rivers, two tributaries of the Yellowstone River that flow north from Wyoming into Montana. Montana alleges that Wyoming has violated the Yellowstone River Compact by failing to deliver Montana's allocation of water in those rivers. The Bill of Complaint alleges four ways in which activities in Wyoming deplete the rivers in violation of the Compact: by new water storage, by new irrigated acreage, by new groundwater pumping and by new consumption of irrigation water on previously irrigated acreage, all since January 1, 1950.

The Special Master has recommended that Wyoming's Motion to Dismiss Montana's Bill of Complaint be denied, but he has concluded that the last listed activity – new consumption of irrigation water on lands in Wyoming irrigated under pre-1950 rights – cannot lead to a violation of Montana's Compact rights. As will be shown below, this conclusion is inconsistent with the language of the Compact and conflicts with the Special Master's reasoning with respect to the other three actions in Wyoming that he held were actionable under the Compact.

The Special Master has also concluded that Montana, the downstream State, will be required to impose priority water rights administration on its own water users and, implicitly, make a formal demand on Wyoming, before Wyoming will be required to comply

with the Compact. As will be shown, there is no basis in the Compact's language or in this Court's case law for imposition of such conditions on Montana's rights.

While the recommendations of the Special Master are correct in many regards, the conclusions to which Montana excepts would force Montana to accept a diminishment of its rights under the Compact and would place additional and unprecedented burdens on Montana's ability to enforce its rights.

STATEMENT

A. Background

The arid lands of the upper Great Plains are in many cases valueless for agricultural purposes without water for irrigation. Common law principles of western water law developed around the concept that a water right is acquired by diversion of water from a stream and application of that water to a beneficial use. Among appropriators, the first in time is the first in right.

This case involves the physical reality that an upstream State – in this case Wyoming – can increase its uses of water in ways that so deplete a compacted stream that the downstream State – Montana – does not receive, for distribution to its water users, the amount of water guaranteed in the Compact. In general, an upstream water user has the physical ability to deprive downstream users of flows to which the

downstream users are entitled by taking more water from the stream than the upstream user is allowed to take. The Bill of Complaint alleges that Wyoming is doing just this by taking and depleting excessive amounts of water from the Tongue and Powder Rivers.

In 1950, when Montana, Wyoming, and North Dakota adopted the Yellowstone River Compact, the prevalent method of irrigation was flood irrigation. This method of irrigation relies on gravity flow of water across a field to provide water to crops. Under flood irrigation, typically only 65% of the water applied to the field is actually consumed by evaporation or transpiration. The remaining 35% returns to the stream and is available for re-application by water users downstream. As conditions become drier during the summer months, it is typical for an irrigation stream to contain little water other than return flow.

More modern irrigation procedures, such as application of water by sprinkler, allow crops to consume more of the water applied. Use of such procedures can reduce the percentage of water returned to the stream for re-use from 35% to 10% or less. As a result, return flows on which downstream users rely can be reduced or even eliminated entirely. Montana's exception presents the question whether Wyoming, as the upstream State, can allow its water users, by adoption of more consumptive irrigation methods that reduce or eliminate return flows, to deplete the Tongue and Powder Rivers to an extent that denies

Montana its share of the waters of these streams allocated under the Yellowstone River Compact.

B. The Yellowstone River Compact

The Yellowstone River Compact was negotiated between the States of Montana, Wyoming and North Dakota ("States") as a means of apportioning the waters of the Yellowstone River Basin and, more particularly for purposes of this case, the Tongue and Powder Rivers, interstate tributaries of the Yellowstone River that begin in Wyoming and flow into Montana. The Compact was ratified by the States and Congress in 1951. 65 Stat. 663. The complete text of the Compact is attached to the First Interim Report ("FIR") as Appendix A.[1]

The Yellowstone River runs generally northeast for almost 700 miles from its headwaters in Wyoming through Montana and into North Dakota to its confluence with the Missouri River soon after crossing the North Dakota border. FIR 3. The Yellowstone River has four principal tributaries, which begin in Wyoming and flow north into Montana, two of which are the subject of this original action. *Id.*, at 3-4. The First Interim Report describes the major geographical

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[1] Citations to the Compact will be by reference to the copy attached as Appendix A to the First Interim Report. The citations will be abbreviated "Compact at" followed by the page number of Appendix A to the First Interim Report.

features of the Basin, FIR 3-4, and contains a map of the Basin as Appendix C.

C. Prior Proceedings in This Case

Montana filed its Motion for Leave, Bill of Complaint and Brief in Support in January 2007. The Bill of Complaint sought a declaration by the Court that the Compact recognizes and protects actual uses of water at the time of the Compact (pre-1950 uses), and provides an enforcement mechanism if post-1950 development in Wyoming adversely affects pre-1950 uses in Montana. The Bill of Complaint included four counts describing four different types of activities in Wyoming that may violate the Compact if they deplete the water supply necessary to satisfy pre-1950 uses in Montana:

1. New and expanded water storage (¶ 9);
2. New irrigated acreage (¶ 10);
3. New groundwater pumping (¶ 11);
4. New consumption of water on existing irrigated acreage (¶ 12).

The Court granted the Motion for Leave on February 15, 2008. *Montana v. Wyoming & North Dakota*, 552 U.S. 1175 (2008).

At the same time, the Court allowed Wyoming to file a motion to dismiss. *Ibid.* Wyoming did so, and, in its supporting brief, claimed that the Compact did not require it to deliver any quantity of water at the state

line for pre-1950 uses in Montana, and that the Compact's only purpose was to allocate water that was unused and unappropriated as of 1950. See Wyoming's Motion to Dismiss Bill of Complaint 36-37. Montana submitted a brief in opposition, and amicus briefs were filed by the United States and the Northern Cheyenne Tribe. The Court then appointed Barton H. Thompson, Jr., as Special Master. 129 S.Ct. 480 (October 20, 2008).

The Special Master heard oral argument on the Motion to Dismiss and entertained subsequent motions to intervene by Anadarko Petroleum Corporation, as well as a motion for partial summary judgment by Montana on a discrete question of whether the Compact included tributaries of the interstate tributaries. The Special Master's rulings on these motions are contained in the First Interim Report, FIR 90-115, and are not at issue in Montana's Exception. The Special Master has recommended that Wyoming's Motion to Dismiss be denied. Montana supports that recommendation, but seeks a ruling from this Court on two points set forth in Montana's Exception, as more fully described below.

D. The First Interim Report of the Special Master

In denying the Motion to Dismiss, the Special Master rejected Wyoming's view that the Compact only allocates water that was unused and unappropriated as of 1950, and does not recognize or protect

pre-1950 uses in either State. Rather, the Special Master ruled that the Compact "protects pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming subsequent to January 1, 1950." FIR 89, ¶ 1.

Nonetheless, there are two aspects of the First Interim Report that Montana challenges in this Exception. First, the Special Master concluded that, contrary to Paragraph 12 of Montana's Bill of Complaint, increased consumption in Wyoming on pre-1950 irrigated acreage cannot violate the Compact. Paragraph 12 alleges: "Since January 1, 1950, Wyoming has allowed the consumption of water on existing irrigated acreage in the Tongue and Powder River Basins to be increased in violation of Montana's rights under Article V of the Compact." In response to this claim, the Special Master concluded:

> 8. Article V(A) of the Compact does not prohibit Wyoming from allowing its pre-1950 appropriators to conserve water through the adoption of improved irrigation techniques and then use that water to irrigate the lands that they were irrigating as of January 1, 1950, even when the increased consumption interferes with pre-1950 uses in Montana.

FIR 90, ¶ 8.

Second, the Special Master also concluded that Wyoming's obligation to deliver water at the state line is contingent upon actions by Montana:

> 3. Where Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice Montana's other rights under the Compact, an intrastate remedy is the appropriate solution. Where this is not possible, however, the Compact requires that Wyoming ensure that new diversions or withdrawals in Wyoming not interfere with pre-1950 appropriative rights in Montana.

Id., at 89, ¶ 3.

Montana challenges Conclusion No. 8 because it has the potential to prevent Montana from conducting discovery and presenting evidence on some aspects of its Paragraph 12 claim unless Conclusion No. 8 is overruled by the Court. Montana challenges Conclusion No. 3 because, unless overruled by the Court, it has the potential to place additional burdens on Montana that are not expressed in the Compact or recognized in the Court's precedents.[2]

---

[2] Although Montana's arguments in this Brief are necessarily founded on the protections afforded by Article V(A) of the Compact, Montana has pleaded its Bill of Complaint in broad terms that go beyond Article V(A). Montana expressly maintains its claims that go beyond Article V(A). See FIR 93-95 (reserving any ruling on the scope of the Bill of Complaint beyond Article V(A)).

SUMMARY OF ARGUMENT

1. The States entered into the Yellowstone River Compact to attain an equitable allocation of the waters of the Yellowstone River and its tributaries, and to eliminate "all causes of present and future controversy" between the States and their respective citizens. Compact at A-1. They accomplished the equitable allocation by adopting a three-tier system in which all "beneficial uses" existing in the three States as of January 1, 1950 "shall continue to be enjoyed," with any remaining water not needed to satisfy pre-1950 rights dedicated first to supplemental water for pre-1950 rights and last to the States according to a percentage allocation. Compact, art. V(A) and (B), at A-7.

The Compact is an enforceable agreement among the States, not among their individual water users. The Special Master correctly found that it obligates Wyoming to deliver at the state line a block of water sufficient under the stream conditions then in existence to satisfy Montana's pre-1950 rights. FIR 21-22. Montana's Bill of Complaint does not seek an order from this Court directing Wyoming to meet its obligation in any particular way. The means by which Wyoming delivers the water are of no consequence; what is important to Montana is that Wyoming meet its obligation to Montana under Article V of the Compact.

The Special Master correctly interpreted the Compact to allow Montana to enforce the allocation

when activities in Wyoming reduce stream flows below levels needed to satisfy Montana's pre-1950 rights. FIR 16-37. He found that the Compact language clearly and unambiguously protected Montana's right to insist that its pre-1950 uses "continue to be enjoyed," a term whose "natural meaning" protected them from interference by Wyoming's post-1950 actions. FIR 16-17.

The Special Master then correctly applied the clear Compact language to hold that Montana could base a cause of action for violation of its pre-1950 Compact rights on new irrigation activities in Wyoming, FIR 40-41, new expansion of storage in Wyoming, *id.*, at 41-43, and new pumping of groundwater that, by virtue of hydrological connection to the stream, reduced streamflow, *id.* at 43-54. With respect to each activity, the Special Master did not require that there be specific language in the Compact allowing Montana to challenge the activity. Rather, he concluded that the Compact's requirement that Montana's pre-1950 rights "continue to be enjoyed," was sufficient to support Montana's claim.

The Special Master erred, however, in his consideration of the role of increased consumptive use on lands irrigated under pre-1950 rights. With respect to this aspect of Montana's claim, the Special Master thought that the right to increase consumptive use was an attribute of the pre-1950 Wyoming right that was protected by the Compact. He reached this conclusion, not by applying Compact language but by overlooking it in favor of an ultimately inconclusive

survey of the common law of prior appropriation in Wyoming, Montana, and the West. In doing so, he misunderstood the nature of Montana's claim and disregarded the Compact's plain language.

Montana does not seek an order from this Court that Wyoming curtail more efficient irrigation practices. Wyoming can allow, or even encourage such practices, as long as Wyoming accounts for their effect on stream flows on which Montana relies for its pre-1950 rights, and makes up any shortfall in some other way.

The plain language of the Compact protects Montana's right to object to increased depletion of the stream. The Compact protects the enjoyment of pre-1950 "beneficial uses" in the three signatory States. "Beneficial use" is defined in the Compact in terms of depletion of the water supply. Thus, regardless of any contrary state law rules, Wyoming's pre-1950 rights are protected up to the extent of their pre-1950 consumption, but no more.

The Special Master erred when he applied a different analysis to this particular Wyoming method of increasing depletions. This Court should act to correct this error.

2. For much the same reason, the Special Master erred in suggesting that Montana could not enforce its Compact rights against Wyoming without first taking intrastate enforcement actions to satisfy

its pre-1950 rights. The Compact contains no such condition precedent to an enforcement action.

The Special Master correctly interpreted the Compact to require the delivery at the state line of sufficient water to satisfy Montana's pre-1950 uses. Actions taken or not taken in Montana cannot be an excuse for Wyoming's failure to do what the Compact requires. The Special Master's conclusion in this regard was erroneous.

ARGUMENT

I. Standards for Compact Interpretation

A congressionally approved interstate compact is a law of the United States. See *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (*citing Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). As a result, the customary rules of statutory construction apply. *New Jersey v. Delaware*, 552 U.S. 597, 610 (2008) (*citing New Jersey v. New York*, 523 U.S. 767, 811 (1998)). As with other federal laws, if the text of the Compact is unambiguous, it is conclusive. See, *e.g.*, *Kansas v. Colorado*, 514 U.S. 673, 690 (1995) ("unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms") (*citing Texas v. New Mexico*, 462 U.S. 554, 564 (1983)). In *New Jersey v. Delaware* the Court observed:

> Interstate compacts, like treaties, are presumed to be the "subject of careful

> consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties."

552 U.S. at 615-616 (*quoting Rocca v. Thompson*, 223 U.S. 317, 332 (1912)). In interpreting the Compact, the Court should give effect to every clause and every word. *Id.*, at 610; see also *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

On the other hand, if the language of the compact is ambiguous, other reliable indications of the parties' intent may be taken into account. *Oklahoma v. New Mexico*, 501 U.S. at 235 n.5. Those sources include legislative history and other extrinsic material, including evidence regarding the negotiating history of a compact. *Ibid.*

II. The Compact Does Not Allow Wyoming to Deplete Flows on Which Montana Depended at the Time of the Compact

A. The Compact Created a Permanent Allocation Among the States

It is a fundamental principle that a compact is an enforceable allocation of water between States, not between individual users. Ever since *Hinderlider v. La Plata River & Cherry Creek Co.*, 304 U.S. 92 (1938), it has been abundantly clear that individual water users are subject to a State's compact entitlement, not

vice versa. *Id.*, at 106-107. In that case, a ditch company sought to enjoin the Colorado State Engineer from honoring a rotation agreement contained in the La Plata River Compact on the grounds that the rotation interfered with its rights under Colorado law. This Court unanimously held that a compact apportionment binds the private water users of each State. *Id.*, at 106. Yet, as explained in more detail below, the First Interim Report allows the allocation between Wyoming and Montana on the Yellowstone River to be changed by individual water users who implement changes in irrigation practices that have the effect of reducing flows below the amount needed to satisfy Montana's Compact allocation. For example, Wyoming irrigators would be allowed by the Special Master's ruling to increase their consumption, thereby reducing the return flows on which Montana depends to zero.

It is clear from *Hinderlider* that a compact creates an allocation, or method of allocation, that will apply according to its terms during the life of the compact. The Yellowstone River Compact is not time-limited. Therefore, the allocation methodology of the Yellowstone River Compact is permanent as long as the Compact remains in effect. This does not mean that the same amount of water is due at the state line on every day, of course, but only that the methodology that requires a certain amount of water to be at the state line depending on water supply conditions, is permanent. But this is exactly what the Special Master proposes to allow Wyoming to change unilaterally.

The notion that a State may unilaterally change the amount of water it is to receive under an interstate compact is an unprecedented and novel proposition, to say the least. *Hinderlider* directly held to the contrary. 304 U.S. at 106-107 (explaining that a State's water users are bound by a compact allocation). In *Kansas v. Nebraska & Colorado*, Special Master McKusick addressed this notion in response to the suggestion by Nebraska that it could deplete the compacted waters of the Republican River by groundwater pumping without accounting for that pumping under the Republican River Compact:

> The Compact endeavors "to provide for an equitable division of such waters," see Art. I, and neither the parties to the Compact, nor the Congress and the President who approved it, could have intended that an upstream State could, with impunity, unilaterally enlarge its allocation by taking some of the virgin water supply before it reached the stream flow.

First Report of the Special Master (Subject: Nebraska's Motion to Dismiss) 21 (2000), *Kansas v. Nebraska & Colorado*, No. 126, Orig.[3] On the basis of Special Master McKusick's First Report, the Court denied Nebraska's Motion to Dismiss. 530 U.S. 1272 (2000).

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[3] The Republican River Compact employs the same concept as the Yellowstone River Compact in its definition of "Beneficial Consumptive Use," which is defined to be "that use by which the water supply of the Basin is consumed through the activities of man." 57 Stat. 86, 87 (1943).

The *Hinderlider* and *Kansas* cases stand for the accepted principle that a State and its water users cannot unilaterally change a State's allocation under a congressionally approved interstate compact. The upstream State is simply not allowed to deplete the downstream State's equitable share of the compacted river contrary to the compact. Yet that is what the Special Master has recommended.

The Special Master's allowance of increased consumption on pre-Compact irrigated lands in Wyoming to the detriment of Montana's pre-1950 allocation is at odds with all of the precedents of the Court. The Special Master's ruling would, in effect, allow the consumption of water that has previously taken place in Montana to be unilaterally transferred upstream to Wyoming. Since there is a direct relationship between consumption of water on irrigated lands and crop yields, this amounts to transferring crop production from Montana to Wyoming. See, *e.g.*, Third Report of the Special Master 47-48, 64 (2000), *Kansas v. Colorado*, No. 105, Orig. (recognizing the direct relationship between crop yield and water consumption based on expert evidence). Thus, the Special Master's recommendation would undo the negotiated apportionment among the States.

B. The Plain Language of Article V Limits Wyoming's Consumption

The Compact states four motivations of the signatory States: (1) considerations of interstate comity;

(2) the desire to remove all causes of present and future controversy; (3) the desire to provide for an equitable division and apportionment of water; and (4) the desire to encourage beneficial development and use. See Compact, at A-1.

To this end, the drafters set up a three-tiered system of apportionment in Article V: existing uses and two types of new uses. Pre-1950 beneficial uses are protected in Article V(A) which states: "Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950 shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." *Id.*, at A-7. Article V(B) then apportions the "unused and unappropriated waters" of the interstate tributaries. *Id.*, at A-7 to A-8. The "unused and unappropriated" waters are divided into supplemental uses and uses on new lands or for other purposes. *Id.*, at A-7.

A comprehensive methodology thus emerges from the structure of the Compact itself: Pre-Compact rights in all three States take first priority. Each State's right is protected in whatever amount was being put to actual beneficial use as of January 1, 1950. Any water available after pre-1950 rights are satisfied may be used under Article V(B), first for new supplemental water supplies for the rights described in Article V(A), and the remainder as divided by specific percentages for uses on new lands or for other purposes. The Special Master adopted this reading

of the Compact, rejecting Wyoming's contrary arguments. FIR 18-19.

Consistent with this methodology, the States are prohibited from depleting the apportioned pre-Compact water supply in two ways: First, Article V(A) provides a mandatory directive that such rights "*shall* continue to be enjoyed." Compact at A-7 (emphasis added). As the Special Master explained:

> The word "enjoy" means "[t]o have the *undisturbed use* or possession of something, particularly real property." Webster's New World Law Dictionary 133 (2006) (emphasis added). . . . Montana water users would not "continue to . . . enjoy[ ]" pre-1950 water rights, under the common and straightforward meaning of those words, if Wyoming were free to allow new diversions or withdrawals that interfere with pre-1950 Montana appropriations.

FIR 17 (*quoting* Article V(A)). It is only because additional withdrawals cause additional depletions that they are forbidden.

Second, the Compact explicitly recognizes that the pre-Compact "beneficial uses" that are protected by Article V(A) involve depletion of the water supply. The Compact makes this clear by defining the term "beneficial use" as "that use by which the water supply of a drainage basin is ***depleted*** when usefully employed by the activities of man." Compact, art. II(H), at A-4 (emphasis added). Thus, Congress and the States recognized the physical reality that the beneficial use of water necessarily involves depletion

(consumption) of water in the process of beneficial use. Any action by Wyoming that deprives Montana of the supply which existed in 1950 violates Article V(A). Thus, Wyoming's pre-1950 rights are protected to the extent of their pre-1950 depletions, but no further.

Despite the foregoing, the Special Master concluded that "[t]he Compact's language says nothing one way or the other regarding the right of a pre-1950 Wyoming appropriator to increase the efficiency or intensity of his or her 'beneficial use' subsequent to the passage of the Compact." FIR 61. This conclusion is hard to reconcile with the central role that "beneficial use" plays in Article V(A) and the unambiguous definition of that term that ties it to depletions. "Increasing efficiency" is a policy description for increasing depletions. See *id.*, at 54-55, 87-88 (describing purportedly positive effects of improved irrigation practices). Policy considerations have no place in compact interpretation. See *New Jersey v. New York*, 523 U.S. 767, 811 (1998) ("[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite.") (quotation marks and citation omitted).

In sum, the Compact prohibits the consumption and depletion of waters by one State that are apportioned to another State under Article V. Thus, Montana cannot increase its consumptive use (depletions) and, on that basis, call upon Wyoming to provide more water to Montana under the guise of uses at the

time of the Compact. By the same token, Wyoming cannot increase the consumptive use (depletions) associated with its diversions at the time of the Compact if it would decrease the flows on which Montana was depending for its uses at the time of the Compact, thus violating Article V(A). There is no principled basis on which to distinguish the increased consumption claim from the other three claims that the Special Master accepted. The Compact "provides block protection for all existing, pre-1950 appropriations," FIR 21, and any interpretation that allows an upstream State to interfere by any means with pre-1950 rights in a downstream State must be rejected.

C. The Special Master's Analysis of New Consumption on Existing Irrigated Acreage Is Inconsistent With His Overall Interpretation of the Compact

In explaining the overall function of the Compact, the Special Master noted that protection of pre-1950 appropriations under Article V(A) "requires Wyoming to ensure on a constant basis that water uses in Wyoming that date from after January 1, 1950 are not ***depleting*** the waters flowing into Montana to such an extent as to interfere with pre-1950 appropriative rights in Montana." FIR 29 (emphasis added). Likewise, the Special Master summarized Article V(A) by declaring that it "clearly and unambiguously protects pre-1950 appropriative rights in Montana from new ***diversions or withdrawals***

in Wyoming that prevent sufficient water from reaching Montana." *Id.*, at 37 (emphasis added).

The Special Master applied these rules with a steady hand in rejecting Wyoming's motion with respect to irrigation of new acreage, construction of storage, and pumping of at least some types of groundwater hydrologically connected to the surface water. In each case, he held that upon proper proof Montana could require Wyoming to curtail or otherwise account for post-1950 changes in water use to protect Montana's pre-1950 allocation. When it came to Montana's Paragraph 12 claim, however, he disregarded the plain meaning of the Compact as he had previously determined it and adopted a rule based on an inconclusive survey of the law of prior appropriation.

The Special Master accurately described the nature of Montana's Paragraph 12 claim as follows:

> Montana's final allegation highlights the difference between the amount of water diverted for an off-stream use and the amount consumed by that use. Most water users consume only a percentage of the water that they divert. The remainder often flows back into a waterway and is available for consumption by downstream users. The percentage of water that is consumed is known as "water efficiency." When a water user increases its water efficiency and thus its consumption, the change can reduce the amount

> of water that flows back into the waterway and is available for downstream water users – even though the amount that is diverted does not increase.

FIR 54-55. The Special Master appears to have conceded for purposes of argument throughout his analysis of this issue that such an increase in "water efficiency" on lands irrigated under pre-1950 Wyoming water rights could serve to decrease the amount of Wyoming's water delivery to Montana in a manner that would prevent enjoyment of Montana's entitlement.

The Special Master's treatment of this form of depletion differed from his treatment of the other three forms of depletion. As to each of the other three, he relied on the general rule under Article V(A) that pre-1950 uses "shall continue to be enjoyed." With respect to these accepted claims, the Special Master found it unnecessary to have specific Compact language governing each offending type of use. With respect to groundwater pumping, for example, he started with the finding that "[f]irst, Article V(A) provides without any limitation that pre-1950 rights 'shall continue to be enjoyed.' Article V(A) does not protect pre-1950 rights only from surface diversions or storage; instead, it provides broadly for the continued enjoyment of such rights." FIR 44.

With respect to new consumptive use on pre-Compact irrigated lands, however, he reversed his analysis 180 degrees. Rather than maintaining his

broad rule based on the broad Compact language, the Special Master began his analysis by looking for specific language allowing Montana to curtail this kind of use, stating: "On its face, the language of Article V(A) would not appear to directly limit the consumptive efficiency of pre-1950 appropriative rights in Wyoming." FIR 59. Yet it is equally true that, on its face, the language of Article V(A) contains no express exception of any kind from the general rule that pre-1950 rights will be protected. It provides no exception for new storage, new irrigated acreage or new groundwater pumping, and it provides no exception for new consumption of irrigation water on pre-1950 irrigated acreage.

The Special Master explained this differing treatment by stating: "While the other allegations involve conflicts between pre-1950 uses in Montana and post-1950 uses in Wyoming, this allegation involves a conflict between two sets of pre-1950 uses." FIR 56. This analysis clashes with the fundamental principle described above that a compact is an enforceable allocation of water between States, not between individual users. *Hinderlider v. La Plata River & Cherry Creek Co.*, 304 U.S. 92, 106-107 (1938). The Compact does not allocate water for individual uses in each State. See FIR 99 ("Interstate water disputes such as the instant action by Montana inherently deal with sovereign interests that supersede the interests of individual water users"). It creates "block protection for all pre-1950 rights." *Id.*, at 22.

In effect, the Special Master's ruling turns the rule announced in *Hinderlider* on its head. This is true because the First Interim Report, if adopted, allows the allocation between Wyoming and Montana on the Yellowstone River to be changed by individual water users. For example, if pre-1950 Wyoming irrigators as a block have traditionally consumed 65% of their diversions, the Special Master's ruling would allow them to increase their block consumption to 100%, thereby reducing the return flows on which Montana depends for its pre-1950 uses to zero. Under the Special Master's interpretation, the Compact would leave Montana without recourse.

The Special Master's unique treatment of new consumptive use on pre-Compact irrigated lands reflects a fundamental misunderstanding of the Compact. The Compact promises delivery at the border of sufficient water to meet Montana's pre-1950 uses. Montana has never contended that the Compact requires Wyoming to meet this obligation in any particular way. Nor has Montana requested an order from this Court specifying the particular actions Wyoming must take to meet its obligations.

If a shortfall in Wyoming's delivery obligation stems from increased groundwater pumping, for example, Wyoming need not make up the deficiency by reducing groundwater pumping. Instead, it is free to choose any appropriate legal or administrative adjustments, as long as the result is a sufficient supply at the state line to meet its Compact obligation. It could meet the obligation by reducing groundwater

pumping, curtailing irrigation on lands not irrigated prior to 1950, or providing releases from storage. As long as Wyoming provides the water the Compact requires, it is of no moment for Montana how Wyoming accomplishes the task. Of course, if Wyoming, faced with an interpretation by this Court requiring delivery of Montana's entitlement, refuses to provide it, this Court retains the authority to impose more specific requirements.

D. The Special Master Essentially Disregarded the Compact's Definition of "Beneficial Use"

The Special Master concluded, based on his analysis of the common law, that a pre-1950 water right in Wyoming, and therefore the Compact, included as an attribute the right to increase consumption by use of more efficient irrigating practices. FIR 86-87. In reaching this conclusion, he disregarded plain Compact language establishing that Wyoming's pre-1950 rights are limited to beneficial uses then in place, and that the limits of those uses was the water they consumed. His reliance on perceived common law principles that contradict explicit Compact definitions is an error this Court must correct.

Under Article V(A), irrigators in both Wyoming and Montana are entitled to "continue[ ] to . . . enjoy[ ]" their "appropriative rights ***to the beneficial uses of water*** . . . in accordance with the laws governing the acquisition and use of water under the

doctrine of appropriation." (Emphasis added.) "Beneficial use" is a defined term in the Compact. Article II(H) states:

> The term "Beneficial Use" is herein defined to be that use by which the water supply of a drainage basin is ***depleted*** when usefully employed by the activities of man.

Compact, art. II(H), at A-4 (emphasis added). The Compact as of 1950 locked in "that use by which the water supply of [the Yellowstone River System] [was] depleted." *Ibid.* When Wyoming allows its users to consume more water on existing acreage, that water is removed from the system and is no longer available to Montana to satisfy its pre-1950 rights. To the extent that increased consumption on existing irrigated acreage in Wyoming deprives Montana of the water it received and used prior to 1950, it necessarily violates the plain edict of the Compact that Montana shall "continue to . . . enjoy[ ]" its pre-1950 uses.

This aspect of the protection afforded to Montana's "beneficial uses" is a function of the plain language and structure of the Compact that the Special Master overlooked. Rather than apply the Compact definition of the term, the Special Master mistakenly found that the definition of "beneficial use" merely "echoes the traditional requirement of prior-appropriation law that appropriations actually divert water from a stream for consumptive use." FIR 61. The basis for the Special Master's finding is that

"[r]ead in the context of western appropriation law, the beneficial-use language in Article V(A) addresses the *types* of uses that the Compact protects, not the right of a pre-1950 appropriator to increase his or her efficiency." *Ibid.* (emphasis in original).

If the text of a compact is unambiguous, it is conclusive. See, *e.g.*, *Kansas v. Colorado*, 514 U.S. 573, 690 (1995). To the extent that common law principles conflict with the plain language and structure of the Compact, they are not controlling. See *generally* 2B Sutherland Statutory Construction § 50:1 (7th ed.) (explaining that resort to common-law principles is proper only where a statute is ambiguous); *accord Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (extrinsic materials may be used to interpret a compact where it is ambiguous). In the present case, the Court need not look to the common law or other extrinsic materials because the Compact is unambiguous that "beneficial use" is defined in terms of depletions. Since "beneficial use" is a defined term, the Special Master should have read it according to the Compact's definition. *Kansas v. Colorado*, 514 U.S. at 690 ("unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms") (*citing Texas v. New Mexico*, 462 U.S. 554, 564 (1983)). It is a fundamental principle of Compact and statutory construction that "the context of western appropriation law" cannot alter this plain language.

This error is important for Montana's increased consumption claim. The Special Master concluded

based on his analysis of the common law that a pre-1950 water right in Wyoming included as an attribute the right to increase consumption by use of more efficient irrigating practices. FIR 86-87. But the Wyoming water users "beneficial use" as defined in the Compact is limited to the amount "depleted when usefully employed by the activities of man." The Special Master should have employed the Compact definition regardless of any other attribute of the doctrine of prior appropriation. Under the plain language Wyoming's pre-1950 users can not adopt more consumptive irrigation practices that deprive Montana of its Compact allocation. See, *e.g.*, *Kansas v. Colorado*, 514 U.S. at 689-690 (increased use of pre-Compact rights allowed under the law of prior appropriation nevertheless violates Arkansas River Compact if it depletes usable flows to the downstream State).

E. Reliable Extrinsic Authority Does Not Contradict, But Supports Article V(A)'s Express Limitation on Consumption

As demonstrated by the arguments set forth above, the plain language of the Compact is unambiguous, and resort to extrinsic sources to determine the intent of the parties is unnecessary. However, should the Court conclude that the language of Article V(A) is ambiguous and requires construction, reliable extrinsic sources of the parties' intent confirm that the Compact was intended to fix the allocation

between the States and thereby preclude increased depletions by any means that would impair any of the States' pre-1950 rights.

The Compact drafters were well versed in the concepts of consumptive use and return flows. For instance, the Engineering Report produced for the Compact Commission devotes an entire section to calculations of consumptive use in the Basin. The compacting States thus understood that Montana, as the downstream State, would rely on the return flows from Wyoming, and that Montana's allocation would be reduced by increased consumption in Wyoming. See Joint Appendix[1] 502 ("Joint App.") (discussing necessity of factual data establishing the "net water duty on irrigated lands," and the sufficiency of annual run-off of the Basin to meet "existing and potential consumptive uses"); *id.*, at 764 (discussing return flows); *accord Texas v. New Mexico*, 462 U.S. at 570 ("It is difficult to conceive that Texas would trade away its right to seek equitable apportionment in return for a promise that New Mexico could, for all practical purposes, avoid at will"). As the Senate Report explains, the allocations in Article V(B) "take into account return flows and uses of them, as well as original runoff." This same statement applies to Article V(A). Article V(A) was designed to fix and protect existing rights as measured by the amount of water actually being put to consumptive and beneficial use

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[1] The Joint Appendix is described at FIR 3.

in each State on January 1, 1950. Wyoming, in fact, insisted that this be the case. See, *e.g.*, Joint App. 120 ("Wyoming suggests that the actual beneficial use now made of water be declared the principal factor in dividing the water to meet the needs of the situation as it is today. Actual use of water on land is of more importance than priorities or court decrees").

The Senate Report provides the cleanest description of the protections afforded by Article V(A):

> Existing appropriative rights as of January 1, 1950, are recognized in each of the signatory States. No regulation of the supply is mentioned for the satisfaction of those rights, and it is clear, then, that ***a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing.*** Where these rights have deficient supplies they would be supplemented by rights obtained from "unused and unappropriated waters" in the basin as of January 1, 1950, from the allocated waters under subsection B.

Sen. Rep. No. 883, 82d Cong., 1st Sess. (1951), at 2. (Joint App. 13) (emphasis added). Thus, the Senate Report was clear that the Compact would not allow one State to cause another State to receive a different supply of water. But by increasing its consumption on existing irrigated acreage, Wyoming has caused Montana to receive a different supply of water. Contrary

to the Special Master's recommendation, this additional consumption in Wyoming on existing pre-Compact acreage has no "legal standing" under Article V(A).

F. Article V(A)'s Reference to the Doctrine of Prior Appropriation Does Not Alter the Compact's Limitation on Consumption

Rather than focus on the plain definition of "beneficial uses" in Article V(A), the Special Master focuses on the language in Article V(A) that those uses are protected "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." See FIR 65. According to the Special Master:

> If prior-appropriation law clearly proscribe[d] increases in consumption on existing acreage to the detriment of downstream appropriators, the Compact arguably would prohibit Wyoming from allowing its appropriators to make such increases to the detriment of Montana's pre-1950 uses.

Ibid. The Special Master then devoted 24 pages of the First Interim Report to an ultimately inconclusive analysis of the laws of various western States and the thoughts of commentators on the question. The result of this analysis can be summarized as follows: (1) neither Montana nor Wyoming courts have expressly decided the exact issue presented; (2) three

Wyoming cases "strongly indicate that Wyoming appropriators are free to increase consumption on existing acreage through improved irrigation techniques;" (3) Montana law is inconclusive; (4) a review of case law from other States does not show that "Wyoming's rule is anomalous, although some courts might reach different results;" and (5) therefore, "the most reasonable interpretation of Article V(A), as applied in this context, is that it does not ban increased consumption on existing acreage as a result of improved irrigation," a result that "favors Wyoming over Montana." FIR 86-87. Respectfully, the Special Master's conclusion is incorrect and should be overruled for two reasons: (1) the enactment of the Compact established the interstate allocation and preempted any State law to the contrary; and (2) the Court should not rely on an "inconclusive" analysis to modify the plain language of the Compact, FIR 86.

First, the Compact does not adopt any aspect of the prior appropriation doctrine that is inconsistent with the Compact allocation. Once the Compact was enacted into state and federal law, the allocation negotiated by the States was established. The enactment of the Compact into federal law had the effect of preempting state law contrary to the Compact. As shown above, Article V(A) protects only each State's "beneficial uses" in place as of 1950. Since the Compact defines "beneficial use" in terms of the amount of water depleted from the stream it protects pre-Compact uses only to the extent of their pre-Compact consumption.

Once the Compact was enacted, its terms govern the allocation between Montana and Wyoming. Consequently, while it is true that the Compact refers to the state law "doctrine of appropriation," if that doctrine is inconsistent with the allocation set forth in the Compact in any respect, it is the Compact that governs. *Hinderlider*, 304 U.S. 92 (1938).

Moreover, as recognized by the Special Master, the States intended to avoid interstate administration across state lines. *E.g.*, Sen. Rep. at 1, Joint App. 12. The reference to the prior appropriation doctrine relied upon by the Special Master was included in the Compact to specify that the "acquisition and use" of the water associated with those water rights within the two States would continue to be administered *intra*state in accordance with that State's prior appropriation laws. See Joint App. 61-62; *accord, Nebraska v. Wyoming*, 325 U.S. 589, 623 (1945) ("Nor will the decree interfere with relationships among Colorado's water users. The relative rights of the appropriators are subject to Colorado's control"). It does not affect the overall allocation as between the two States.

The Special Master acknowledged that "whether and under what circumstances an appropriator can increase consumption to the detriment of downstream appropriators is not one of the clearer areas of prior-appropriation law." FIR 65. He further observed that "Montana law is ultimately inconclusive" on the issue. *Id.*, at 86. Nonetheless, despite the "confused" nature of "the law pertaining to seepage or return flows," the Special Master relied on his own interpretation of

that same law for his conclusion.[5] *Id.*, at 65 (*quoting* Frank J. Trelease, *Reclamation Water Rights*, 32 Rocky Mtn. Min. L. Inst. 464, 469 (1960) (quotation marks omitted)). In light of the plain language of the Compact, it was unnecessary to delve into this issue at all.

Moreover, the Wyoming cases relied upon by the Special Master are inapposite. As the Special Master recognized, different rules have developed with regard to whether a senior appropriator can increase his or

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[5] According to the Special Master, "the only legal commentary that [he] found explicitly addressing the question of whether an irrigator can switch to a more efficient irrigation system concludes that such a switch is legal even if it reduces downstream flows to other appropriators." FIR 77, *citing* David H. Getches, Water Law in a Nutshell 144 (Thomson/West 2009) ("Getches"). A closer examination, however, reveals that the cited text does not support the Special Master's conclusion in this case. Dean Getches explains that increased consumption would be allowed, so long as the amount consumed is "within the terms of the original appropriation." Getches 144. Dean Getches also clarifies that the total water used may not exceed the maximum limit as defined by the diversion or consumption. *Id.*, at 140. As recognized by the Special Master, Article V(A) ensures the States' ability to "continue ... to enjoy[ ]" its "beneficial uses" based on *actual use*. Thus, the actual use of water in 1950 provides the maximum limit on pre-1950 Wyoming water rights under the Compact. Dean Getches recognizes that consumption must be contained "[w]ithin these limits." *Ibid.* Moreover, Dean Getches expressly recognizes protections afforded to downstream junior appropriators. See, *e.g.*, *id.*, at 174 ("The doctrine of prior appropriation recognizes a right of junior appropriators in the continuation of stream conditions as they existed at the time of their respective appropriations" (internal quotation omitted)).

her consumption to the detriment of a junior appropriator, and these rules are based in part on whether the water is "seepage water," "waste water," or "return flow." *Id.*, at 65; see also Montana's Letter Brief 2-4 (7/17/09) ("Mont. Ltr. Br.") (available at http://www.stanford.edu/dept/law/mvn/). The consequences of the distinction between return flows and seepage are substantial. If the water is waste or seepage that never reached a natural watercourse where it was relied upon by a junior appropriator, the original appropriator can reuse the water. See Mont. Ltr. Br. 2, 8-12, and cases cited; Joseph L. Sax, Barton H. Thompson, Jr., et al., Legal Control of Water Resources 197 (Thomson/West 2006) ("Sax et al."). But if the water is return flow that reached the natural watercourse or source and was relied upon, downstream appropriators may object to a reduction in that return flow. Mont. Ltr. Br. 3-5, 8-10; Sax et al. 199, 270, 274; David H. Getches, Water Law in a Nutshell 120-121, 173-175 (Thomson/West 2009) (*cited in* FIR, at 77-78).

As Montana explained in its Letter Brief to the Special Master, its claim arises from diminishment of water that returned to the natural watercourses of the Tongue and Powder Rivers, where it had been appropriated and relied upon by Montana water users. Because Montana claims rights to *return flow*, as opposed to waste or seepage, several principles of the doctrine of appropriation, including the No-Injury Rule, see Mont. Ltr. Br. 5-6; Sax et al. 270, 274, and the doctrine of beneficial use, see Mont. Ltr. Br.

4-5; Sax et al. 152-153, prohibit Wyoming from increasing its total consumption to the detriment of Montana. Taken together, these universal western water law principles establish that (1) a downstream appropriator has a right to the maintenance of the stream flow in the condition that existed when the downstream right was perfected, and (2) that an upstream appropriator, such as Wyoming in this case, may not reduce historic return flows where the water has returned to the natural watercourse from which it originated.

The Special Master conflated principles dealing with the two different kinds of capturable water. The three Wyoming cases that the Special Master found instructive – *Fuss v. Franks*,[6] 610 P.2d 17 (Wyo. 1980), *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593 (Wyo. 1957), and *Binning v. Miller*, 102 P.2d 54 (Wyo. 1940) – are all seepage cases. They involve conflicting claims by neighbors to surface runoff before it has returned to the stream channel. Montana does not complain that Wyoming's pre-1950 users are reusing seepage water and thus preventing it from reaching

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[6] In *Fuss v. Franks* the Wyoming Supreme Court clarified that where water flows uninterrupted to a natural stream, it leaves the upstream appropriator "without any superior right." 610 P.2d at 20. Accordingly, the court found that the downstream appropriator had a valid and vested right to the return flow water, and the upstream user had no superior right to that same water. *Id.*, at 21. Montana advocates for the application of this same rule.

Montana as surface runoff. As a result, the Special Master erred in placing reliance on those cases.

Since, as discussed above, the language of the Compact is plain in its protection of Montana's right to continue to receive water to satisfy its pre-1950 uses, the Court need not address this "inconclusive" and "confused" area of law. Rather, the Court should rely on accepted principles of Compact interpretation to overrule the Special Master's recommendation.

III. Wyoming's Compact Obligations Are Not Contingent Upon Montana's Actions

The First Interim Report contains the following legal conclusion: "Where Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice Montana's other rights under the Compact, an intrastate remedy is the solution." FIR 89, ¶ 3. This conclusion of the Special Master shortchanges the Compact rights of Montana in several ways. Most importantly, it suggests that there is a contingent nature to Montana's allocation of waters of the Yellowstone River and its interstate tributaries. But the Compact provides for no such contingencies. In particular, the Compact does not require that Montana demonstrate that it has exhausted its intrastate remedies in order to be entitled to its allocation of water under the Compact. Yet, the Special Master's Conclusion No. 3 assumes that Montana must

determine, and perhaps be in a position to prove, that it has no purely intrastate means to satisfy pre-1950 appropriators in Montana before it can enforce its rights against Wyoming for the water accorded to Montana by the Compact. Moreover, no "call" or any other communication between Montana and Wyoming is necessary for the enjoyment by Montana of its rights under the Compact.

It must be remembered that the Yellowstone River Compact is a congressionally approved compact among three States, not among individual water users in those States. While Article V(A) speaks in terms of "Appropriative rights . . . in each signatory State," this formulation is simply a means to an end: the apportionment of the waters of the Yellowstone River among the three States. Under any particular set of water supply conditions, there is a determinable amount of water that Wyoming is required to provide to the state line. This amount of water is dependent upon water supply conditions in Wyoming, not upon water administration in Montana or whether Montana has made a "call" on Wyoming.

The Court has never interpreted an interstate water allocation compact to mean that enjoyment by the downstream State of its rights under the compact is contingent upon the downstream State's taking certain intrastate administrative actions. See, *e.g.*, *Kansas v. Colorado*, 514 U.S. 673 (1995) (compact enforced without regard to actions of downstream state); *Texas v. New Mexico*, 482 U.S. 124 (1987) (same). Nor has a State ever been required to place a

"call" or been required to make any kind of a demand of the upstream State in order to be entitled to receive its water. See *ibid.*

Further, Wyoming's obligation to preserve Montana's allocation of water under the Compact is not dependent upon actions of individual water users in Montana. Wyoming's obligations under the Compact were set at the time of the Compact. See, *e.g.*, Compact at A-1 ("[The States] desiring to remove all causes of present and future controversy . . . with respect to the waters of the Yellowstone River and its tributaries . . . and desiring to provide for an equitable division and apportionment of such waters . . . have agreed upon the following articles, to-wit:"). The allocation of water among the States by the Compact for any given set of water supply conditions was determined at the time of the Compact. Otherwise, the States would not have "remove[d] all causes of present and future controversy," nor would it have "provide[d] for an equitable division and apportionment of such waters." It follows that the obligations of Wyoming are independent of actions by Montana or Montana's water users.

The care exercised by the drafters to avoid creation of an interstate water management process strongly suggests that if they had intended to make Montana prove such a condition precedent, there would be at least some reference to the requirement in the Compact. The recommended exhaustion of intrastate remedies requirement is a recipe for precisely the kind of interstate allocation squabbles that

the drafters of the Compact sought to avoid. Wyoming will certainly demand that Montana prove as a condition precedent to any inquiry into Wyoming's own actions that Montana has exhausted intrastate sources of supply for its pre-1950 rights, presumably by requiring Montana to show, among other things, that ***all*** of its pre-1950 users have called ***all*** junior users on the stream. This will trigger discovery regarding a wide array of water management issues in Montana, at great expense and with a great deal of delay in the ultimate resolution of this case. For this reason, it is important that this Court correct the erroneous recommendation.

CONCLUSION

Although Montana supports the Special Master's recommendation that the Court deny Wyoming's Motion to Dismiss, Montana requests that the Special Master's conclusion that would bar Montana's claim based on Wyoming's increased consumption of irrigation water on pre-Compact irrigated acreage, be overruled. Further, Montana requests that the Court overrule the Special Master's conclusion that

Wyoming's Compact delivery obligations are dependent upon Montana's actions.

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No. 137, Original

In The
Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING and
STATE OF NORTH DAKOTA,

Defendants.

On Motion To Dismiss
Bill Of Complaint

BRIEF FOR *AMICUS CURIAE* NORTHERN CHEYENNE TRIBE IN SUPPORT OF PLAINTIFF STATE OF MONTANA

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INTEREST OF *AMICUS*[1]

The Northern Cheyenne Tribe is a federally recognized Indian tribe,[2] occupying a 444,000 acre Reservation along the Tongue River in southeastern Montana. The Tongue River is one of the Interstate tributaries of the Yellowstone River addressed in the Yellowstone Compact and at issue in this case.

The Northern Cheyenne Reservation was established by Executive Order of November 26, 1884. 5 *Indian Affairs: Laws and Treaties* 860 (Charles J. Kappler, ed., Government Printing Office, 1904). The eastern boundary was extended to the "middle of the channel of the Tongue River" by Executive Order of March 19, 1900. 5 *Indian Affairs: Laws and Treaties* 860-61 (Charles J. Kappler, ed., Government Printing Office, 1904). The lands described in the 1900 Executive Order were "set apart as a reservation for the permanent use and occupation" of the Northern Cheyenne Tribe. *Id.* The boundaries of the Reservation, and the Tribe's ownership of and title to the lands within the boundaries were ratified and confirmed by section 1 of the Northern Cheyenne

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[1] No person or entity other than *amicus* authored any portion of this brief or made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief, and the letters of consent are being filed with the Clerk simultaneously with this *Amicus* Brief.

[2] *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18553, 18554 (April 4, 2008).

Allotment Act, Act of June 3, 1926, 44 Stat. 1690. *See Northern Cheyenne Tribe v. Hollowbreast*, 415 U.S. 649, 650 (1976).

As the result of the withdrawal of lands for the Tribe in 1881, and the subsequent establishment of the Tribe's Reservation in 1884 and 1910, water was reserved by and for the Northern Cheyenne Tribe. *See Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 595-96 (1963) (the *Winters* Doctrine applies to executive order reservations as well as treaty reservations).

The nature and quantity of the Tribe's Indian reserved water rights or *Winters* rights, including its rights in the Tongue River, were resolved pursuant to a Compact with the State of Montana in 1991. The Northern Cheyenne Compact was ratified and approved by the Montana Legislature in 1991, Mont. Code Ann. 85-20-301, and by Congress on September 30, 1992, Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. 102-374, 106 Stat. 1186 (1992). The Compact was subsequently approved and confirmed by the Montana Water Court, and entered as a decree in 1995. *In the Matter of the Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation Within the State of Montana in Basins 42A, 42B, 42KJ, & 43P* (Water Court of the State of Montana, Yellowstone River Division, Special Northern Cheyenne Compact SubBasin), *decree entered* September 26, 1995.

Under the Compact and decree, the Northern Cheyenne Tribe's water rights in the Tongue River are: 1) 12,500 acre-feet of direct flow water with a priority date of October 1, 1881 (Art. II.A.2.a); and 2) 20,000 acre-feet of storage water in the Tongue River Reservoir, located south of the Reservation on the Tongue River, or from exchange water,[3] with a priority date equal to the senior-most right for stored water in the Tongue River Reservoir (Art. II.A.2.b). In addition, the Tribe has a separate contract right for 7,500 acre-feet of storage water from Tongue River Reservoir (Art. II.A.2.e).[4]

The Tribe also has water rights in Rosebud Creek, a Montana tributary to the Yellowstone River, in the amount of 1,800 acre-feet and up to an additional 19,530 acre-feet with a priority date of October 1, 1881 (Art. II.A.3). Finally, the Tribe has 30,000 acre-feet of storage in Big Horn Reservoir, (Art. II.A.7), located on the Big Horn River, one of the four interstate tributaries addressed in the Yellowstone Compact, but not at issue in the present matter.

The Northern Cheyenne Tribe has an interest in ensuring that its water rights are fully protected under the Yellowstone Compact, and that the Compact is not

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[3] Exchange water is either direct flow or storage made available to the Tribe in exchange for Tribal return flows made available to other Tongue River water users.

[4] The Tongue River Reservoir was constructed in 1938 and is owned by the State of Montana.

interpreted in a manner that adversely affects the water rights of the Tribe. In addition, to the extent the Tribe's storage rights are affected by the interpretation of the Compact that is made here, the Tribe has an interest in ensuring that any interpretation is protective of the Tribe's rights.

ARGUMENT

I. The Northern Cheyenne Tribe's Right to Use Water Is Protected by the Yellowstone Compact

Notwithstanding the interpretation of the Yellowstone Compact, Pub. L. 82-231, 65 Stat. 663 (1951), as between Montana and Wyoming, the rights to the use of water of Indian tribes in the Yellowstone River and its tributaries, including the Northern Cheyenne Tribe, are protected under the Compact. Article VI of the Compact provides:

> Nothing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.

In commenting on this provision, then Secretary of the Interior, Oscar Chapman, explained to the House and Senate Committees that:

> The water rights of the Indians were reserved by the Indians at the time of the creation of

> the respective reservation by the treaties entered into by the Indians with the United States. These Indian water rights have been recognized by the Supreme Court of the United States. The most important decision is the case of *Winters v. United States* reported in the 207 U.S. 564. This situation explains the inclusion of the language just quoted.

S. Rep. 883, 82d Cong. 1st Sess. (1951), Appendix A to Montana's Brief in Response (hereinafter App. __ at ___) at 25a; H. Rep. 1118, 82d Cong., 1st Sess. (1951), App. B at 11b.[5]

Under Article VI, the rights to use water held by or for the Northern Cheyenne Tribe or for the Tribe, including water rights held by the United States in trust for the Tribe, cannot be adversely affected by the Yellowstone Compact. Therefore, regardless of the manner in which the Yellowstone Compact is interpreted as to the rights of Montana and Wyoming, the rights to use water held by or for the Northern Cheyenne Tribe are protected by Article VI. The Tribe and the United States, on behalf of the Tribe, would have

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[5] The interests of the Tribes were recognized and acknowledged throughout the negotiations leading to the Compact. App. A at 19a: "It should be specially noted that there are great areas of Indian land in the Yellowstone River Basin in both Montana and Wyoming, much of which is irrigated or proposed to be irrigated, and the interest of the Bureau of Indian Affairs in the compact is important. . . . The language submitted by them to cover Indian interests in the compact was adopted verbatim." (R. J. Newell Report to the Congress).

a separate cause of action if the Tribe's water rights are adversely affected by the manner in which water is used or allocated under the Yellowstone Compact. This would include the Tribe's direct flow right, and its storage rights in the Tongue River Reservoir and Big Horn Reservoir, all of which constitute rights to use of water of the Northern Cheyenne Tribe that are protected by the Compact. These rights cannot be infringed or adversely affected by either State exercising its rights under the Compact.

II. Montana Has Stated a Claim Under Article V of the Compact; Accordingly, Wyoming's Motion to Dismiss Should Be Denied

Article V is the heart of the Yellowstone Compact. Under Article V.A, "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." (These rights are hereinafter referred to as "pre-Compact rights".) Article V.B then allocates the "unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950." These waters are allocated first to supplemental water supplies for the pre-Compact rights (hereinafter "supplemental rights"), then to "storage or direct diversions for beneficial use on new lands and for other purposes" in accordance with the percentages

set forth in Article V.B, paragraphs 1 through 4 (hereinafter "post-Compact rights").[4] Article V.C sets out the formula by which the quantity of water available for post-Compact rights is determined.

Montana has alleged in its Bill of Complaint (hereinafter "Compl.") that Wyoming has depleted the waters of the Tongue River and Powder River by various means to the extent that there is insufficient water to satisfy Montana's pre-Compact rights, that Wyoming refuses to curtail its use of water beyond that amount necessary to fulfill its own pre-Compact rights, and therefore Montana and its water users have been injured in violation of Article V of the Compact. Bill of Complaint paragraphs 8-14. Specifically, Montana alleges that 1) Wyoming has constructed and used new and expanded storage facilities in the Tongue and Powder Rivers, Compl. para. 9;[5] 2) Wyoming has put new acreage under irrigation, Compl. para. 10; 3) Wyoming has constructed and used groundwater wells for irrigation and other uses, including coal bed methane production, Compl. para.

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[4] The Interstate Tributaries are the Clarks Fork, the Bighorn River (except Little Bighorn River), the Tongue River and the Powder River. Article II.F.

[5] In Montana's Brief in Support of Motion for Leave to File Complaint at 14, Montana states that since the completion of the Yellowstone Compact, Wyoming has constructed or enlarged eight reservoirs in the Tongue River Basins, and seven reservoirs in the Powder River Basin, an increase in storage capacity of 216,000 acre-feet in the Powder River and 9,400 acre-feet in the Tongue River.

11; and 4) Wyoming has increased the consumption of water on existing irrigated acreage, Compl. para. 12. Montana alleges that these new and expanded uses are not violations of the Compact themselves, but they violate the Compact when they result in insufficient water to satisfy Montana's pre-Compact rights. Montana therefore seeks to require Wyoming "to deliver the waters of the Tongue and Powder Rivers in accordance with the provisions of the Yellowstone Compact." Compl. para. B.

The crux of the dispute is whether the pre-Compact water rights in each state, i.e. the "appropriative rights to the beneficial uses of the Yellowstone River System existing in each signatory State as of January 1, 1950," are protected under Article V of the Compact, and if so, whether Montana's pre-Compact rights are protected from Wyoming's expanded and new uses. We agree with Montana that under the structure of the Compact, the pre-Compact uses are necessarily allocated and protected in order for the Compact to operate.

1. Wyoming urges that the pre-Compact rights and the supplemental rights are subject only to each state's own laws and are not protected under the Compact. Wyo. Br. at 40-43. Essentially, Wyoming argues that the only enforceable provisions of the Compact are the percentage allocations of "unused and unappropriated water" in Article V.B as determined under the formula in Article V.C., the "modified divertible flow" provisions. Under Wyoming's view, the only claim Montana can assert under the

Compact is that "Wyoming is violating its cumulative percentage allocation as of a given date." Wyo. Br. at 48. Under this interpretation, Wyoming is free to infringe on Montana's pre-Compact rights with impunity, and Montana has no cause of action under the Compact to prevent such infringement. Such an interpretation would make the Compact virtually inoperative.

What Wyoming overlooks is that there can be no "unused and unappropriated water" subject to the percentage allocation in Article V.B, if Montana's pre-Compact uses are not being fulfilled. Article V.A establishes a baseline condition against which it is determined whether there is "unused and unappropriated waters" available for allocation under the Article V.B percentages. If the baseline condition is not being met, i.e. sufficient water is not available to fulfill pre-Compact rights, then there is no water to allocate under Article V.B. In that circumstance, any use of water by Wyoming under Article V.B, by definition, would be a violation of the Compact.

Moreover, the pre-Compact rights are necessarily required to be protected, otherwise the pre-1950 condition cannot be maintained as a baseline. Wyoming never explains how the Compact would work without such a protected baseline. Indeed, the provisions of Article V.A and Article V.B are inextricably linked, and both must be enforced in order for the Compact to operate.

Even assuming that Article V.B is the only enforceable provision as Wyoming argues, there is still a basis under that Article to require curtailment of post-Compact uses if there is no unused and unappropriated water available for such uses. Such would be the case if pre-Compact uses are not being satisfied. Therefore, even under Wyoming's restrictive view of the Compact, Wyoming must curtail its post-Compact uses to ensure sufficient water is made available to satisfy by Montana's pre-Compact rights.

2. It is further clear from the structure of the Compact that the baseline condition under Article V.A is the amount of water actually being used as of January 1, 1950, and not the full amount that may have been permitted or appropriated. If the baseline condition was not tied to actual use as of January 1, 1950, then it would be a moving baseline, making it impossible to determine the unused and unappropriated water as of January 1, 1950, for purposes of Article V.B. As stated in the Senate Report: "Article V-B, it is true, allocates to the States the 'unused and unappropriated waters.' But this follows V-A which recognized all existing beneficial *uses* as of January 1, 1950." App. A at 5a [emphasis added]. Under these terms, the V.B allocation applies to water that has not been appropriated, and water that has not been put to use under an existing permit or appropriation, i.e. "unused water." This generally follows the law of appropriation within Montana and Wyoming. *See, e.g.*, Wyo. Stat. 41-3-101. As noted in M. Squillace, *A*

Critical Look at Wyoming Water Law, 24 Land and Water Law Review 307, 324:

> "Beneficial use [is] the basis, the measure and limit of the right to use water. . . ." The earliest Wyoming decisions established that no appropriation is complete until the water is put to a beneficial use. Further, whatever the amount of an adjudicated water right, the true measure of the right is the amount of water put to beneficial use.

Citing Moyer v. Preston, 6 Wyo. 308, 44 P. 845 (1896) and *Basin Electric Power Cooperative v. State Bd. of Control*, 578 P.2d 557 (1978). In Montana, where a permit system has existed only since 1973, Mont. Code Ann. 85-2-301 et seq., the only way to obtain a water right was by putting water to actual beneficial use. *See, e.g., Murray v. Tingley*, 20 Mont. 260, 50 P. 723 (1897).

Therefore, the Compact recognized and protected existing beneficial uses as the baseline condition, but it did not "determine or fix comparable values for existing rights." App. A. at 15a (R.J. Newell Report to Congress). In large part, this was because it was assumed that there was enough water, particularly with storage, to satisfy the existing condition as well as future developments. *Id.* The existing uses are nevertheless protected, even if the assumption of an adequate water supply proves to be wrong.

> V-A. Existing appropriative rights as of January 1, 1950, are recognized in each of the signatory States. No regulation of the

> supply is mentioned for the satisfaction of those rights, and it is clear, then, that a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing.

App. A at 3a (Senate Report). What *is* contemplated, however, is a demand by one State upon the other for the supply "now obtaining under present conditions of supply and diversion." Such a demand *would* have legal standing under the Compact.

3. Wyoming argues that none of its post-Compact expanded or new uses violate the Compact because they are specifically allowed under the Compact and do not exceed its percentage allocation under Article V.B. We do not understand Montana to allege or argue that the nature of such uses violate the Compact. However, to the extent such uses result in insufficient water to satisfy Montana's pre-Compact rights, they violate the Compact. Whether and to what extent the specified uses result in insufficient water to satisfy Montana's pre-Compact rights raise factual and legal issues that Montana should be allowed to address in a case on the merits. At this point, Montana has clearly stated a claim under Article V.A or Article V.B, or both.

CONCLUSION

For the reasons stated, Wyoming's Motion to Dismiss should be denied.

Respectfully submitted,

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INTEREST OF THE UNITED STATES

Wyoming's Motion to Dismiss presents several questions concerning the Yellowstone River Compact (Compact), an interstate agreement negotiated with federal participation, approved by Congress, and possessing the status of federal law. The United States administers water projects throughout the Yellowstone River Basin that may be affected by the Court's construction of the Compact. Pursuant to *Winters* v. *United States*, 207 U.S. 564 (1908), the United States also holds certain rights to waters of the Yellowstone River system in trust for the Indian Tribes whose reservations lie in the river basin. At the Court's invitation, the United States filed a brief addressing Montana's motion for leave to file a bill of complaint.

STATEMENT

The Compact is an agreement among Wyoming, Montana, and North Dakota. See Act of Oct. 30, 1951, ch. 629, 65 Stat. 663 (approving and reprinting the Compact).[1] The Compact allocates the water supply of the Yellowstone River system among those States. Art. V, 65 Stat. 666-668. Montana alleges that Wyoming has breached the Compact by taking water to which Montana is entitled from the Tongue and Powder Rivers, tributaries of the Yellowstone that flow from Wyoming into Montana. Compl. ¶¶ 9-13; Br. in Supp. of Compl. 19.

1. The Yellowstone River Basin is an approximately 70,100-square-mile watershed encompassing parts of Wyoming, Montana, and North Dakota. The mainstem of the Yellowstone River rises in the Wyoming portion of Yellowstone National Park, flows north into Montana, crosses Montana in a northeasterly direction, and joins the Missouri River just across the North Dakota border. Because most of the mainstem lies within Montana, interstate water disputes principally involve the tributaries that rise in Wyoming and cross into Montana before joining the mainstem.

This litigation involves only two of those interstate tributaries, the Tongue and Powder Rivers. Each rises in Wyoming's Bighorn Mountains. The Tongue flows approximately 225 miles northeast to its confluence with the Yellowstone near Miles City, Montana, and its basin covers approximately 5400 square miles. The Powder flows roughly north for approximately 500 miles and joins the Yellowstone at Terry, Montana; its basin encompasses approximately 13,200 square miles. The principal use of water diverted from both rivers is for

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[1] The text of the Compact is appended to Montana's bill of complaint.

irrigation within Wyoming and Montana. The Tongue serves as the primary water source for the Northern Cheyenne Indian Reservation, which is adjacent to the river in south-central Montana.

The other interstate tributaries of the Yellowstone River that are regulated by the Compact are the Bighorn River (except for its tributary the Little Bighorn River) and the Clarks Fork Yellowstone River. Art. II(F), 65 Stat. 665. The Bighorn River (known as the Wind River for part of its upper reaches) rises in Wyoming and meets the Yellowstone in Montana. The principal use of the waters diverted from that tributary in both States is for irrigation; much of the irrigation use in Wyoming is through Bureau of Reclamation projects. Bighorn Reservoir, one of several federal reservoirs in the Bighorn River Basin, straddles the state line and is surrounded by the Bighorn Canyon National Recreation Area. The Crow Indian Reservation and the Wind River Reservation are also located in the Bighorn drainage.[2] The 150-mile Clarks Fork rises in southern Montana, runs south into Wyoming, then flows back into Montana to its confluence with the Yellowstone. Although no compact violation is alleged regarding the Bighorn or Clarks Fork, the water rights and administration in those river basins may be affected by any compact interpretation established in this litigation.

2. The Compact is the product of nearly 20 years of intermittent negotiations, authorized by Congress with the goal of reaching "an equitable division and apportionment * * * of the water supply of the Yellowstone River" and its tributaries. Act of June 2, 1949, ch. 166,

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[2] Under the *Winters* doctrine, the United States holds reserved water rights in trust for the Tribes. See p. 1, *supra*.

63 Stat. 152-153; Act of June 14, 1932, ch. 253, 47 Stat. 306; see Wyo. Br. in Supp. of Mot. to Dismiss 12-17 (Wyo. Br.); Mont. Br. in Response to Wyo. Mot. to Dismiss 2-3 (Mont. Br.). The three States reached agreement on December 8, 1950, and the resulting Compact was subsequently ratified by the state legislatures and approved by Congress in accordance with the Compact Clause of the Constitution, Art. I, § 10, Cl. 3. See Act of Oct. 30, 1951, 65 Stat. 663.

In fulfillment of Congress's goal, the Compact provides for the division of the Yellowstone River Basin's water supply. The preamble declares that the Compact is intended to "remove all causes of present and future controversy between said States * * * with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park." 65 Stat. 663. The preamble further states that the parties "desire[] to provide for an equitable division and apportionment of such waters," and that they acknowledge that "the great importance of water for irrigation" shall be recognized "in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin." *Ibid.* The Compact governs the waters of the entire Yellowstone River System, defined as "the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone," except the streams within Yellowstone National Park. Art. II(D), 65 Stat. 664. Although "[t]ributar[ies]" include "any stream which in a natural state contributes to the flow of the Yellowstone River," Art. II(E), 65 Stat. 664, the Compact principally regulates the waters of the four "Interstate Tributar-

ies," *i.e.*, the Tongue, Powder, Clarks Fork Yellowstone, and Bighorn Rivers. Art. II(F), 65 Stat. 665.[3]

The operative provision, Article V, provides for the division of water between Montana and Wyoming according to a three-tiered framework. Article V(A) sets out the first tier: it provides that "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." 65 Stat. 666. The latter doctrine provides that a person who diverts water and puts it to a beneficial use retains the right to use that water, on a "first in time, first in right" basis, although only to the extent the water is reasonably required and actually used. See, *e.g.*, *Arizona* v. *California*, 298 U.S. 558, 565-566 (1936).

Article V(B) sets out the second and third tiers. 65 Stat. 666. Of the water of the interstate tributaries that is "unused and unappropriated" as of January 1, 1950, the second-tier allocation permits each State to divert water necessary to supplement its first-tier rights. Those supplemental rights, too, are to be acquired and used pursuant to the doctrine of appropriation. *Ibid.* The third-tier allocation gives each State a specified percentage of any remaining "unused and unappropriated" water in each of the four interstate tributaries. Art. V(B), 65 Stat. 666-667. The quantity of water available to third-tier uses in each river and the amounts actually diverted by each State are to be calculated annually. Art. V(C), 65 Stat. 667.

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[3] Water for domestic use and (in moderate amounts) for watering livestock is excluded from the Compact altogether. Art. V(E), 65 Stat. 667.

The Compact creates a Yellowstone River Compact Commission to administer the Compact as between Montana and Wyoming. (North Dakota does not participate in the Commission.) The Commission includes one representative from each of the two States and a federally appointed chairman, who has no vote except in case of tie votes on certain core matters. Art. III(A) and (F), 65 Stat. 665, 666. The Commission's jurisdiction includes the "collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this Compact, and recommendations to [the signatory] States upon matters connected with the administration of this Compact." Art. III(C), 65 Stat. 665. The Commission also may formulate rules and regulations necessary to carry out the Compact's provisions. Art. III(E), 65 Stat. 666. Historically the Commission has not served as a forum for resolving water-rights disputes.

The present controversy relates principally to the operative provisions in Article V(A), (B) and (C) of the Compact. Article V(D), regulating the respective rights of Montana and North Dakota in the mainstem of the Yellowstone, is not implicated, nor are the rights and limitations set out in Articles VI through XI. Article VI, however, does serve effectively to exclude Indian water rights from the scope of the present dispute between Montana and Wyoming. Article VI provides that "[n]othing contained in th[e] Compact shall be so construed or interpreted as to affect adversely the use of any rights to [Yellowstone River System waters] owned by or for Indians." Art. VI, 65 Stat. 669; see also U.S. Invitation Br. 8 n.3 (explaining possible implications for the Northern Cheyenne).

3. Montana alleges that in some recent years, there has been insufficient water available in the Powder and Tongue Rivers to satisfy pre-1950 water rights in Montana under the Compact's first tier. Compl. ¶¶ 14-16; Br. in Supp. of Compl. 14, 17. Montana further alleges that while its pre-1950 users have been short, Wyoming has permitted upstream diversions from these two interstate tributaries to post-1950 uses. Montana contends that when Montana's first-tier rights are not satisfied, there is no "unused and unappropriated" water to be allocated between the States pursuant to the Compact's second and third tiers, and that in those circumstances diversions in Wyoming for post-1950 use violate the Compact.

Montana specifies four categories of post-1950 uses into which the allegedly impermissible diversions fall. First, Montana asserts that new storage reservoirs have been built and used in the Wyoming portion of the Powder and Tongue basins since 1950. Compl. ¶ 9. Second, Montana alleges that new acreage in Wyoming has been put under irrigation since 1950. *Id.* ¶ 10. Third, Montana alleges that groundwater pumping in Wyoming for irrigation and other uses, including coalbed methane production, has reduced flows in the Tongue and Powder basins. *Id.* ¶ 11; Mont. Br. 51. Fourth, Montana alleges that Wyoming water users have increased their consumption on existing acreage by implementing new irrigation methods that result in less water making its way back to the stream as return flows. Compl. ¶ 12; Br. in Supp. of Compl. 15-16.

4. This Court granted Montana leave to file its complaint, and invited Wyoming to submit the instant motion to dismiss. 128 S. Ct. 1332 (2008).

SUMMARY OF ARGUMENT

Article V(A) provides federally enforceable protection for the water rights that existed in Wyoming and Montana as of 1950. The text and history of the Compact show that these first-tier rights were to be preserved inviolate, without expansion or contraction. The Compact provides that the "existing" water rights "shall continue to be enjoyed" following the Compact's enactment, consistent with the state-law appropriation doctrines that created them. Art. V(A), 65 Stat. 666. And the Compact permits more junior, post-1950 diversions only if the water diverted is "unused and unappropriated." Art. V(B), 65 Stat. 666. The essence of Montana's claim is that when Montana's first-tier users are short, there is no "unused and unappropriated" water, and the "appropriated" water must flow to the pre-1950 users who appropriated it.

Montana's basic claim is correct, but Montana's right to redress under this provision is a limited one, for it depends on showing that its own pre-1950 users are receiving insufficient water *and* that users in Wyoming are diverting water to post-1950 uses. That limited right is consistent with the simple and straightforward function of Article V(A), which preserves and protects pre-1950 rights just as they existed in each State. Wyoming's position—that pre-1950 rights received no protection *at all* under the Compact—cannot be squared with the text and history of Article V(A).

Montana also pleads facts that, if proven, would show a Compact violation. Montana alleges that waters to which its own first-tier users are entitled are instead being diverted to several specific post-1950 uses in Wyoming, *i.e.*, storage, irrigation of new acreage, and groundwater pumping for irrigation or industrial use.

Montana also suggests that decreasing the *return* flows from water that was already diverted to irrigation before 1950 is a post-1950 use; that assertion fails, because the Compact preserves pre-1950 Wyoming users' state-law right to use all of the water they diverted, so long as the use (irrigation of the identical acreage) remains the same. But because Montana's three remaining allegations are sufficient to state a claim for violation of Article V(A), the motion to dismiss should be denied.

ARGUMENT

Pursuant to this Court's order inviting Wyoming's motion, the applicable standard is drawn from Rule 12(b)(6) of the Federal Rules of Civil Procedure. Montana must present "[f]actual allegations" sufficient "to raise a right to relief above the speculative level, on the assumption that all the [factual] allegations in the complaint are true." *Bell Atl. Corp.* v. *Twombly*, 127 S. Ct. 1955, 1965 (2007) (citations omitted). Montana satisfies that standard.

I. THE COMPACT AFFORDS PRE-1950 USERS A LIMITED RIGHT TO REDRESS FOR INJURY TO PRE-1950 WATER USES

The text, structure, and history of the Compact together establish that Article V(A) protects the water rights being put to beneficial use before 1950 against subsequent new diversions.[1] That reading compels the conclusion that Montana may bring an action to enforce its rights under Article V(A) if its citizens' pre-1950 water rights are infringed.

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[1] Montana's allegations do not yet require the Court to determine whether rights recognized under state law in 1950, but not then being put to beneficial use, are protected. See note 12, *infra*.

Montana's suggestion that it can proceed in the alternative under a different theory, relying on Article V(B), appears not to be properly presented, and rests in any event on a flawed assumption about Article V(B)'s operation. The United States' position that the motion to dismiss should be denied turns entirely on the conclusion that Montana has stated a claim under Article V(A).

A. Article V(A) Of The Compact Protects First-Tier Rights Against Encroachment By Second- And Third-Tier Rights

1. The plain text of the Compact specifies that pre-1950 water rights "shall continue to be enjoyed in accordance with * * * the doctrine of appropriation." Art. V(A), 65 Stat. 666. The clear import of that language is that neither State may interfere with the other's continued enjoyment of its existing appropriative rights, and that post-1950 diversions may come only from unused and unappropriated waters. But on Wyoming's reading, Montana's continued enjoyment of those pre-1950 rights could be disrupted at will by post-1950 users in Wyoming. That reading runs contrary to the Compact itself.

Wyoming does not rely on the text of Article V(A), but asserts instead that the negotiating history supports its position. Although the materials on which Wyoming relies may properly be considered in appropriate circumstances, all are secondary to the Compact's text. The Compact is not only an agreement among the three State parties, but also a law of the United States. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Texas* v. *New Mexico*, 482 U.S. 124, 128 (1987). As with other federal laws, if the text, read in light of its context, is unambiguous, it is conclusive. See, *e.g.*, *Kansas* v. *Colorado*, 514 U.S. 673, 690 (1995) ("We conclude that

the clear language of [the Arkansas River Compact] refutes Colorado's legal challenge."). If the Court finds the text ambiguous, it may also consider other reliable documentary indicia of the intent of Congress and the parties, including materials submitted to Congress in support of congressional approval. See *Oklahoma* v. *New Mexico*, 501 U.S. at 235 n.5; *Texas* v. *New Mexico*, 462 U.S. 554, 568 n.14 (1983); *Arizona* v. *California*, 292 U.S. 341, 359-360 (1934).

In this case the best reading of the text contradicts Wyoming's position that Article V(A) creates no enforceable rights. That Article provides that pre-1950 appropriative rights to the beneficial use of water existing in each State "shall continue to be enjoyed" under the laws implementing the appropriation doctrine. 65 Stat. 666. Wyoming reads Article V(A) "to carve * * * pre-1950 rights out of the rest of the Compact" altogether. Wyo. Br. 21. But the Compact uses the operative term ("enjoyed") in a mandatory way ("shall continue") that is bound up with the Compact's allocation of the Yellowstone System's waters. Article V(B), which creates the second tier of Compact water rights (*i.e.*, rights supplemental to the first tier), uses essentially the same language as Article V(A): the rights in question are "to be * * * enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." 65 Stat. 666. Those second-tier rights are affirmatively "allocated" by the Compact between Montana and Wyoming. *Ibid.* This repetition of the term "enjoyed" in a provision that is plainly a substantive allocation, not a carveout, reinforces the conclusion that the phrase "shall continue to be enjoyed" in Article V(A) similarly serves a substantive role, because identical terms used in adjacent sections of the same statute

customarily are given the same meaning, see, *e.g.*, *Commissioner* v. *Lundy*, 516 U.S. 235, 250 (1996). Hence, the inclusion of the phrase "shall continue to be enjoyed" in Article V(A) affords pre-1950 rights at least some federally enforceable protection from infringement.

The preamble of the Compact supports that interpretation. The preamble recites that the signatory States "desir[ed] to *remove all causes of present and future controversy* between said States and between persons in one and persons in another with respect to *the waters of the Yellowstone River and its tributaries*, * * * and desir[ed] to provide for an equitable division and apportionment of *such waters*." 65 Stat. 663 (emphases added). The preamble supports reading the Compact to address all rights to waters of the Yellowstone System, rather than to exclude the set of rights existing as of January 1, 1950, and leave them subject only to state law that potentially offers no interstate redress. Cf. *Virginia* v. *Maryland*, 540 U.S. 56, 68-69 (2003) (using preamble of interstate compact as interpretive aid); *General Dynamics Land Sys.* v. *Cline*, 540 U.S. 581, 589-590 (2004) (using federal statute's statement of purpose as interpretive aid).[5]

The Compact's text also contradicts Wyoming's related argument (Br. 44) that because the Compact measures compliance on an annual basis, "Wyoming cannot violate the Compact based on some daily comparison of rights on either side of the state line." The Compact's specification that determinations be made "on an annual water year basis" applies only to "[t]he quantity of water subject to the percentage allocations," *i.e.*, to the *third-*

[5] The task specified by Congress for the negotiators—to reach "an equitable division and apportionment * * * of the water supply"—supports the same interpretation. Act of June 2, 1949, 63 Stat. 153.

tier water rights that Article V(B) allocates by percentages. Art. V(C), 65 Stat. 667. By contrast, first-tier rights are to be enjoyed "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Art. V(A), 65 Stat. 666. The latter doctrine contains no such principle of annual computation. Thus, although Wyoming is correct that allegations of excessive diversion of third-tier water by one State as against third-tier rights of the other State must be based on annual calculations, see pp. 20-21, *infra*, that annual-accounting principle is not present in Article V(A).

2. The history of the Compact's negotiation, approval, and ratification confirms what the text of the Compact indicates: *viz.*, that Article V(A) affords substantive protection for first-tier rights against infringement by post-1950 diversions. The Congress that approved the final text, the Executive Branch that recommended its approval, and the parties that negotiated it all appear to have shared the understanding that pre-Compact rights would be genuinely protected. Wyoming's current interpretation is contrary to that documented understanding.

a. Wyoming and Montana agree generally that negotiating history is relevant in interpreting the Compact's text. Wyo. Br. 38-39; Mont. Br. 15; see *Oklahoma* v. *New Mexico*, 501 U.S. at 235 n.5; *Arizona* v. *California*, 292 U.S. at 359-360; cf. *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (applying the same principle to treaty interpretation). Montana suggests, however (Br. 19-23), that some aspects of the negotiating history are not properly considered at this stage, and that the motion to dismiss should be denied for that reason. Montana's suggestion is not well taken. In par-

ticular, the contents of the Engineering Committee Report excerpted in the appendix to Wyoming's brief (and set forth in full at App., *infra*, 1a-4a) do not appear controvertible, as the compact-negotiation minutes demonstrate. See *id.* at 7a-9a (minutes memorializing state representatives' receipt and discussion of Engineering Committee Report); see also S. Rep. No. 883, 82d Cong., 1st Sess. 2 (1951) (noting that official versions of Compact minutes were filed with the appropriate federal agency, and that "most of the questions [were] answered" by the Engineering Committee). Even if the commissioners did not adopt the full Report, there was no dispute over its content.

In any event, whatever the merits of Montana's objections to particular documents, the mere fact that Wyoming has submitted (or excerpted) such documents should not automatically move the case into a summary-judgment posture, as under the Federal Rules. See *Ohio* v. *Kentucky*, 410 U.S. 641, 644 (1973) (stating that this Court's "object in original cases is to have the parties, as promptly as possible, reach and argue the merits," and thus to dispose of antecedent legal questions at the earliest stage "feasible").

b. The negotiating history clearly indicates that the federal government understood the Compact to be protecting first-tier rights. Upon submitting the draft to Congress for ratification, the Executive Branch communicated its view that the proposed Compact "recognizes the [existing] appropriative rights * * * and it permits the continued enjoyment of such rights," while Article V(B) allocates only the waters "residual after the enjoyment of the rights in [Article V(A)]." S. Rep. No. 883, *supra*, at 11 (reprinting report of the Secretary of the Interior). Reports of both relevant congressional com-

mittees were in accordance with that view. See *id.* at 2 (pre-1950 rights "are recognized");[6] H.R. Rep. No. 1118, 82d Cong., 1st Sess. 2 (1951) (Article V(A) "recognizes the appropriative rights" existing in 1950). Although it was understood that "a demand of one State upon another for a supply *different from that now obtaining* under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing," S. Rep. No. 883, *supra*, at 2 (emphasis added), a demand to enforce rights to the "supply * * * now obtaining" is another matter.

The negotiating history further confirms that the States shared this understanding. As Wyoming notes, the drafters agreed that pre-1950 rights would not be administered under the Compact on an interstate priority basis—meaning that, for example, a downstream Montana user with a 1930 water right would not be entitled to strict priority over an upstream Wyoming user with a 1940 water right. See Wyo. Br. 12-13, 21, 42. And the drafters did not seek to *reallocate* between the two States water that had already been appropriated by 1950. See App., *infra*, 2a (Engineering Committee Report); *id.* at 11a (Compact Commission minutes). Thus, the federal representative explained to Congress, "the agreement sought on *division* of waters" would not "include the water now appropriated and in use." S. Rep. No. 883, *supra*, at 6 (emphasis added). But the drafters also manifested broad agreement that existing rights would be recognized, as they had been created, under the doctrine of appropriation. See, *e.g.*, App., *infra*, 14a ("Mr. Burke [a federal representative] stated that there

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[6] The Senate Report was signed by Senator Joseph O'Mahoney of Wyoming, who chaired the committee. See S. Rep. No. 883, *supra*, at 1.

seemed to be no question about recognizing existing rights, that the question was what body would enforce those rights, the Courts or a Compact Commission.").

3. Wyoming contends (Br. 40-42) that the principal lesson of the Compact's history and context is that the drafters chose to base the agreement on a modified "divertible flow" principle rather than on a "depletion" principle. A divertible-flow compact allocates shares of the water that is available for diversion during the period of measurement (which in the final Compact is one year, but in previous drafts was a single day). Each State may take a specified percentage of the available water, so the volume actually diverted depends on the volume available in the river. The depletion principle, by contrast, specifies the actual volume or percentage of available water supply that each state may actually consume during the period—and therefore the quantity, but not necessarily the flow, that the upstream State must leave in the river for the downstream State's use. *Id.* at 10-11. Wyoming contends that Montana is demanding delivery of a specified quantity of water for pre-1950 uses and that the Compact's adoption of the divertible-flow principle forecloses that argument. *Id.* at 42.

The history that Wyoming cites, however, shows that the drafters adopted a modified divertible-flow principle only in making the "allocation of the *unused* waters of the Yellowstone River," which principally means the third-tier water apportioned by Article V(B) and (C). Wyo. App. 61-62 (emphasis added); App., *infra*, 14a-15a. The Interior Secretary's report makes the same point: "*In paragraph C of article V*, there is adopted a modified version of the divertible flow principle." S. Rep. No. 883, *supra*, at 11 (emphasis added). Thus, the rejection of the depletion principle appears not to be significant to

the protection of first-tier rights under Article V(A), which is governed by "the doctrine of appropriation," 65 Stat. 666.

a. The doctrine of appropriation is therefore the background principle that is most relevant to the question presented in this case, *i.e.*, what recourse downstream pre-1950 water users have during times of shortage, when not enough water comes downstream to satisfy their appropriative rights. Under the doctrine of appropriation, as a general matter:

> The diversion from the stream and the application of the water to a beneficial purpose constituted an appropriation, and the appropriator was treated as acquiring a continuing right to divert and use the water to the extent of his appropriation, but not beyond what was reasonably required and actually used. This was deemed a property right and dealt with and respected accordingly. As between different appropriations from the same stream, the one first in time was deemed superior in right.

Wyoming v. *Colorado*, 259 U.S. 419, 459 (1922) (discussing Wyoming and Colorado law).

The doctrine of appropriation was prompted by necessity. As this Court has recognized, flows in western streams and rivers vary greatly over the year. Heavy winter snowfall in the mountains melts in the late spring and early summer, producing high flows in May, June, and July, but lower flows in other months. *See, e.g.*, *Wyoming* v. *Colorado*, 259 U.S. at 457-458. Because irrigation is essential to western agriculture, *see ibid.*, access to irrigation water during the low-flow periods is critically important. Water rights under the doctrine of appropriation are not simply a matter of annual volume of water; in times of shortage when demand exceeds the

flow of a river, the doctrine allocates stream flow by priority of appropriation. See, *e.g.*, 1 Samuel C. Wiel, *Water Rights in the Western States* § 301, at 311 (3d ed. 1911) ("In times of natural or other deficiency * * * the prior appropriator may still claim his full amount * * *. This is true even where (indeed, especially where) unusual scarcity or dry season causes the deficiency.").

As explained above, the Compact does not adopt the rule of strict interstate priority as among pre-1950 Montana users and pre-1950 Wyoming users, creating a single integrated priority among users in the two States. See p. 15, *supra*.[7] But if Article V(A)'s retention of "the doctrine of appropriation" as the governing law is to have any meaning, it must give *pre*-1950 Montana users priority over *post*-1950 Wyoming users. That priority is therefore enforceable under the Compact. Wyoming's contrary reading of the Compact would effectively leave pre-1950 users in Montana, the down-stream State, categorically unprotected against diversions by *all* junior users upstream (even those with a post-1950 priority).

b. Applying this principle here is fully consistent with the drafters' choice of the modified divertible-flow principle. To the extent that principle is even relevant to the interpretation of Article V(A), it establishes only

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[7] There is no occasion here for the Court to decide whether—although the Compact itself does not impose an interstate priority of pre-1950 rights in the two States—the Compact would preclude the Court, in the exercise of its original jurisdiction, from apportioning water to afford some protection for pre-1950 Montana users as against pre-1950 Wyoming users in a time of shortage. Montana has not sought any such relief in this case.

that Montana's recourse under that provision is limited to the actual protection of valid pre-1950 rights.

The "depletion" theory that was considered during the compact negotiations was based on one used in the Upper Colorado River Basin Compact, see Act of Apr. 6, 1949, ch. 48, 63 Stat. 31, to which Wyoming, but not Montana, is a party. App., *infra*, 8a, 14a. Under the Upper Colorado Compact, each State in the Upper Basin is allocated a quantity of water each year for consumptive uses in each State.[*] Upper Colorado Compact Art. III(a)(2), 63 Stat. 33. The depletion theory is applied annually and does not guarantee any set flow at any given time, only an annual volume of water to be delivered to, and consumable by, each State. See p. 16, *supra*. The "divertible flow" theory, by contrast, allocates and administers water on the basis of a right to divert a *percentage* of each river (not a particular quantity). See Wyo. App. 17-19 (1942 draft compact). The Engineering Committee modified the divertible-flow principle to use annual administration (whereas an unmodified divertible-flow principle would use daily administration, which is much more difficult in practice). App., *infra*, 2a-3a.

Montana's claim does not depend upon adopting the depletion principle that the Compact's drafters rejected. Wyoming's argument would have some purchase if Montana were arguing for delivery of a fixed quantity of water. See Wyo. Br. 42. But Montana is arguing that its pre-1950 users are sometimes short of water at times

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[*] The fixed quantities are based on percentages of the 7.5 million acre-feet per year that are allocated to the Upper Basin, with certain limitations, by the (pre-existing) Colorado River Compact. See Upper Colorado Compact, Art. III(a)(2), 63 Stat. 33; Colorado River Compact Art. III(a) and (d), 70 Cong. Rec. 325 (1928).

when Wyoming's post-1950 users are diverting water. Mont. Br. 42. Wyoming is not obliged to deliver a fixed quantity of water to Montana, because when first-tier users in Montana are short, Wyoming has no obligation under the Compact to curtail its own pre-1950 diversions. And Wyoming is not capped in the amount of water that it can consume when Montana's first-tier users *are* adequately supplied; at those times the only limits are Article V(B)'s percentage allocations of third-tier water. But Wyoming may not divert water lawfully appropriated by Montana's first-tier users and give it to second- or third-tier users in Wyoming (who by definition may use only "unused and unappropriated" water). That proposition has nothing to do with the drafters' choice of divertible flow over depletion as the basis for allocating third-tier water.

B. Montana's Claim May Proceed Only Under Article V(A)

Montana suggests, for the first time, that the motion to dismiss should be denied in any event, on the theory that even if Wyoming is not violating Montana's pre-1950 rights, it is (or may be) violating *post*-1950 rights. See Mont. Br. 17-18, 38-39, 44. To the extent that Montana seeks to introduce a new, freestanding allegation that Wyoming is consuming more than its percentage share under Article V(B) and (C), that allegation would not be appropriately introduced at this stage of the litigation.[9] In any event, Montana's contention appears to

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[9] Montana's motion for leave to commence this action repeatedly asserted that Montana's first-tier rights under Article V(A) were at issue. Br. in Supp. of Compl. 17-20, 33; Br. in Supp. of Compl. App. A5; Mont. Reply Br. 2. As Montana recognizes (Br. 18), it is limited to the theory it advanced in seeking leave to file the action, unless it seeks and obtains leave to file an amended bill of complaint, which is sparingly

rest on the assumption that Article V(B) is violated whenever water that should go to a pre-1950 Montana user in fact goes to a post-1950 Wyoming user; that assumption is flawed, because the operation of Article V(B) turns on *annual* computation of divertible flows.

Montana would be correct in its assertion—that any infringement of first-tier rights is itself a violation of Article V(B)—only if Article V(B) involved daily computation. Under such a regime, if Wyoming diverted the vast majority of the flows of a tributary river for any day, giving some to pre-1950 uses and some to post-1950 uses—and if the amount left for Montana was not enough to satisfy all of Montana's pre-1950 users (leaving none at all for Montana's post-1950 users)—then Wyoming arguably would be in breach of Article V(A) *and* (B). That is so because Article V(C)'s formula excludes diversions for pre-1950 uses. As a result, in this example, Wyoming would be diverting 100% of the water not excluded from the computation—clearly exceeding its percentage allocation. But because the measurement period under Article V(C) is a full year, Wyoming's total annual diversions could remain within the percentage allocations even if during the peak irrigation season Wyoming were giving water to post-1950 users and leaving pre-1950 Montana users short. Therefore, not all violations of first-tier rights are necessarily also violations of the third-tier allocation.

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granted in original actions. See *Nebraska* v. *Wyoming*, 515 U.S. 1, 8 (1995).

II. MONTANA HAS ADEQUATELY PLEADED A CLAIM FOR REDRESS OF ITS PRE-1950 RIGHTS

Wyoming contends in the alternative that even if Article V(A) creates enforceable rights, Montana's complaint fails to plead a cognizable injury to those rights. Montana alleges that Wyoming is infringing its rights under the Compact in four separate ways. Compl. ¶¶ 9-12. Thus, for Wyoming's motion to succeed on this basis, it must establish that none of these four allegations is sufficient to state a claim upon which relief may be granted.

Montana's complaint sufficiently pleads cognizable injury to pre-1950 rights. The allegations that Wyoming has permitted new storage and irrigation of new acreage, and allowed the depletion of the Yellowstone System waters through groundwater pumping, state a claim under the Compact. Wyoming is correct that Montana does not state a claim by complaining about increased consumption of water on existing acreage; however, because Montana satisfies its pleading burden without depending on that allegation, Wyoming's argument on that point is not a sufficient basis on which to grant the motion to dismiss the complaint.

A. Article V(A) Gives Montana's Pre-1950 Rights Priority Over All Post-1950 Diversions, Including Storage And Irrigation Of New Acreage

Montana's first two factual allegations allege that Wyoming has violated Montana's first-tier rights by diverting water to post-1950 storage and to post-1950 irrigation, when that water was necessary to satisfy the appropriative rights of first-tier Montana users. Compl. ¶¶ 10-11. Wyoming objects (Br. 50-54) that these allegations do not make out a Compact violation.

These allegations are sufficient to state a claim if the Court agrees with Montana that Article V(A) does create enforceable rights. All Montana need allege is that, at a time when there is no "unused and unappropriated" water, Wyoming is making diversions to post-1950 uses, in violation of Montana's first-tier rights under the Compact. Montana has alleged two such post-1950 uses: storage and irrigation. (Storage in reservoirs built after 1950, and storage in then-existing reservoirs for post-1950 uses, count as post-1950 diversions under the Compact. See Art. V(C)(2) and (3), 65 Stat. 667.) Contrary to Wyoming's suggestion, Montana is not contending that the Compact forbids building new storage or irrigating new acreage, but rather that those uses must be achieved with "unused and unappropriated" second- and third-tier water, and that Wyoming has been diverting Montana's first-tier water to those uses.

B. Removing Water From The Yellowstone River System Using Groundwater Wells Is A Cognizable Diversion

Montana also alleges that Wyoming users have diverted first-tier water to various post-1950 uses by pumping groundwater "in violation of Montana's rights under Article V of the Compact." Compl. ¶ 11. Although Wyoming contends that the Compact does not regulate groundwater at all, Montana is correct that if pumping groundwater removes surface water from the Yellowstone River's covered tributaries, then the pumping is a diversion regulated by the Compact. Although the Compact does not apportion the two States' entire supply of groundwater, it also does not create a "groundwater exception" to its apportionment of all waters in the Yellowstone River System.

1. The "Yellowstone River System" comprises (with exceptions not relevant here) "the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River." Art. II(D), 65 Stat. 664. A "diversion" from the Yellowstone River System, in turn, is defined as "the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken." Art. II(G), 65 Stat. 665. Any "diversion" from one of the interstate tributaries for irrigation, municipal, or industrial use is counted against the appropriate State's percentage allocation of third-tier water, unless the diversion is for a pre-1950 or supplemental use. Art. V(C)(1), 65 Stat. 667.

The plain text of the Compact encompasses diversions accomplished by pumping groundwater as well as diversions accomplished by directly diverting surface water through ditches or pumps. Any act that involves the "taking or removing of water" from a stream covered by the Compact is a regulated diversion. Art. II(G), 65 Stat. 665. There is no limitation based on the means or the directness of the diversion, only an exception for water returned directly to the channel. Accordingly, on the face of the Compact, if groundwater pumping that commenced after January 1, 1950, "remov[es]" water from an interstate tributary, then that pumping amounts to a second- or third-tier diversion. And for the reasons discussed above, such diversions are limited to "unused and unappropriated" water; the Compact forbids an upstream post-1950 user in Wyoming from causing a shortage to a pre-1950 user in Montana.

Contrary to Wyoming's insistence (Br. 60, 62), no specific reference to "groundwater" in the text of the Compact is necessary, especially given the Compact's capacious definition of "diversion." Nor is Montana's allegation inconsistent with the Compact's use of the terms "river" and "stream," *ibid.*, or with its incorporation of the divertible-flow method, because Montana's theory is that the pumping removes water from the surface flows of the interstate tributaries.

Wyoming (Br. 62) and amicus Anadarko (Br. 8) make much of the proviso that water is not "divert[ed]" if it is "returned directly into the channel of the Yellowstone River or of the tributary from which it is taken." Art. II(G), 65 Stat. 665. But this exception does not show that the underlying definition excludes water that is not taken directly from the channel. The prepositional phrase "from which it is taken" is most naturally read to modify the immediately preceding word "*tributary*," not the earlier noun "channel," for several reasons.

First, the "rule of the last antecedent" presumes that a "limiting clause or phrase" like this one "should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Jama* v. *ICE*, 543 U.S. 335, 343 (2005) (quoting *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2004)). That presumption accords here with the natural reading: under the Compact, the third-tier allocation applies only to "waters of the Interstate tributaries," Art. V(B), 65 Stat. 666, so water subject to the third-tier interstate allocation will *always* be "taken" from one of the tributaries. Thus, the Compact's definite, unconditional reference to "the tributary from which [the water] is taken" makes logical sense.

Second, treating the exception for immediately returned flows as narrowing the notion of a "diversion"

would distort the Compact's meaning and coverage. The Compact makes manifest its purpose to apportion *all* of the waters of the Yellowstone River System, "including springs and swamps, from [the] source[] [of every Yellowstone tributary] to the mouth of the Yellowstone River." Art. II(D), 65 Stat. 664; see Pmbl., 65 Stat. 663. The stream flow that the Compact allocates thus comes from both surface-water runoff and groundwater discharge. Wyoming and Anadarko's reading would permit a State to drain headwater springs and swamps, and to contend that it was not thereby "remov[ing]" water from the *channel* of a compacted stream. The Compact's definition of the river system that it is apportioning refutes any notion that the drafters wrote in such a loophole.

Thus, the exception simply provides that a diversion will not be counted if the water is returned "directly" into the tributary from which it came (not into another tributary) or into the Yellowstone mainstem. The language of that exception should not be read as defining the general term "diversion" and defeating the Compact's expansive definition of that term. Rather, the modest limitation in the exception, which properly treats non-consumptive uses (such as hydroelectic power generation) as causing no net change in divertible flow, simply does not exclude groundwater from a definition that otherwise would cover it in appropriate circumstances.

2. Nothing in the history of the Compact or of water law suggests that the plain text of the "diversion" definition should be disregarded. Although the ownership of groundwater, standing alone, may have been unsettled at the time (see Anadarko Br. 6-7), the treatment of underground water *that made its way into a stream* was settled. Long before the Compact was negotiated, "scientific investigation ha[d] dispelled much of th[e] mys-

tery concerning the movement of underground water." 2 Wiel, *supra*, § 1082, at 1022. As a leading treatise put it in 1911:

> If, on the proof, the percolations are shown to be tributary to the spring or watercourse in a material degree, the loss of them causing a substantial diminution of the spring or watercourse, they are now treated as a component part of the watercourse, * * * and rights therein are not regarded as underground rights separate therefrom.
>
> * * * [Cases from several States] hold[] that percolations tributary to a stream are a part thereof, and cannot * * * be diverted from existing claimants on the stream, otherwise than the stream itself, on the surface, could.

Id. at 1023. Montana was among those jurisdictions. See, *e.g.*, *Smith* v. *Duff*, 102 P. 984, 986 (Mont. 1909) ("It must not be forgotten that the subsurface supply of a stream, whether it comes from tributary swamps or runs in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules.").

As Montana demonstrates (Br. 50, 53), other compacts negotiated at comparable times have been construed to regulate groundwater. See, *e.g.*, First Report of the Special Master at 19-45, *Kansas* v. *Nebraska*, 530 U.S. 1272 (2000) (No. 126, Original) (concluding that the 1942 Republican River Compact restricts groundwater use without using the term "groundwater");[10] *Kansas* v.

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[10] Nebraska excepted to the Special Master's conclusion, but this Court overruled its exceptions and denied the motion to dismiss. *Kansas* v. *Nebraska*, 530 U.S. 1272 (2000). The parties subsequently stipulated to the adoption of a mathematical model to calculate the

Colorado, 543 U.S. 86, 90-91 (2004) (detailing Special Master's similar conclusion with respect to the 1949 Arkansas River Compact). Although these other compacts differ textually and structurally from the Yellowstone River Compact and from one another, they demonstrate that interstate compacts can sensibly be read to encompass groundwater pumping that circumvents the compacts' allocation of surface water. First Report of the Special Master at 23-25, *Kansas* v. *Nebraska*, *supra*. A compact need not include any special recitation in order to prevent a groundwater loophole; a plainly applicable apportionment of substantive rights is enough. Here, the Compact's protection of Montana's first-tier rights against second- and third-tier diversions by Wyoming extends to all such diversions, including diversions accomplished by groundwater pumping.

Montana indicates that it intends to prove that such diversions occurred, by establishing the requisite hydrological connection between groundwater pumping and the removal of water from the Yellowstone River System. Br. 56 ("Montana generally agrees that the Compact does not address groundwater that does not affect water supply in Montana."). The complaint's allegation (at ¶ 11) that groundwater pumping is occurring "in violation of Montana's rights under Article V of the Compact" sufficiently incorporates that factual contention for purposes of this motion to dismiss.[11]

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amount drawn from the Republican River as a result of groundwater pumping. See Final Report of the Special Master at 1, 6-7, *Kansas* v. *Nebraska*, 540 U.S. 964 (2003).

[11] Amicus Anadarko's factual prediction (Br. 15-16) that Montana will be unable to prove any such connection, at least as to some forms of groundwater pumping, is obviously not relevant at this stage.

C. More Efficient Use Of Water By Wyoming's Pre-1950 Users Does Not Violate The Compact

Montana's final allegation is that Wyoming users with pre-1950 rights are diverting the same amount of water for use on the same acreage, but consuming more of it and allowing less return flow back to the river system. See Compl. ¶ 12; Br. in Supp. of Compl. 15-16; Mont. Br. 47-49. Montana contends that this increased consumption through more efficient use amounts to post-1950 use that must yield to Montana's pre-1950 rights. Under the doctrine of appropriation as it existed in Wyoming at the relevant time, Wyoming's first-tier water users had the right to the full amount of the water they diverted to beneficial use, which could include water lost and returned to the river during the irrigation process. If those Wyoming users continued to divert the same amount of water, but used that water more efficiently and thus returned less water to the river, Wyoming law treated the more efficient use as within the original appropriative right. The Compact accordingly does the same. This allegation by Montana thus fails to support any claim of a Compact breach.[12]

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[12] To be sure, if these users were devoting their diversions to acreage that they had not irrigated in 1950 (although they may have had a "paper" right to do so), the new use might be considered a post-1950 use under the Compact. See pp. 31-32, *infra*. Montana, however, alleges only that pre-1950 users are decreasing their return flows from "*existing* [as of 1950] irrigated acreage." Compl. ¶ 12 (emphasis added). The Court therefore need not reach Montana's argument (Br. 33-35) that the Compact protects pre-1950 rights only to the extent they were actually used in 1950: in this allegation Montana assumes that Wyoming users are *diverting* the same amount of water, but wasting less.

The Compact did not adopt a nondepletion principle that guaranteed a certain amount of water for Montana's first-tier rights as against Wyoming's first-tier rights; it did not quantify the appropriative rights existing as of January 1, 1950; and it did not impose any new limitations on such appropriative rights beyond those contained in each State's existing laws. See S. Rep. No. 823, *supra*, at 6. Article V(A) simply provides that first-tier rights "shall continue to be enjoyed in accordance with the laws"—presumably meaning the "laws" of each respective "signatory State"—"governing the acquisition and use of water under the doctrine of appropriation," and accordingly that they shall be protected to that extent against infringement by second- and third-tier diversions.[13]

As Wyoming explains (Br. 55-57), Wyoming law at the time of the Compact did not require an appropriator to use the same (or equally inefficient) irrigation technology, or to maintain his return flows at a constant level, in order to retain the priority of his water right. Under Wyoming law, "[n]o appropriator can compel any other appropriator to continue the waste of water which benefits the former." *Id.* at 57 (quoting *Bower* v. *Big Horn Canal Ass'n*, 307 P.2d 593, 601 (Wyo. 1957)).

Binning v. *Miller*, 102 P.2d 54 (Wyo. 1940), a pre-Compact case, is illustrative. An irrigator had for years

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[13] Montana quotes a passage in the Senate Report stating that "[a]llocations, thereby, take into account *return flows and uses of them*, as well as original runoff." Br. 43 (quoting S. Rep. No. 823, *supra*, at 2); see also *id.* at 47. That passage discusses the allocation formula for third-tier water under Article V(C) based on water actually in the river during the accounting year. It has no bearing on the rights protected by Article V(A), which are defined by the state-law appropriation doctrine.

used an irrigation method that lost considerable water to seepage and waste. See *id.* at 58. That water ran downhill onto a neighboring property, where the landowner sought to appropriate it. See *id.* at 56-57. The irrigator subsequently built a dam to cut off the return flow across the neighbor's land and to use it to irrigate new land. See *id.* at 57. The Wyoming Supreme Court explained that "the general rule is still that seepage water belongs to the owner absolutely, so long, at least, as he can make beneficial use of it on the land for which it was appropriated." *Id.* at 61. That general rule did not apply in *Binning*, because the irrigator sought to divert the seepage to *new* acreage. See *ibid.* But here, on the facts alleged in Montana's complaint, the general rule *would* apply: a Wyoming user diverts only the water to which he has had a right since before the Compact, and irrigates only the acreage that he has irrigated since before the Compact. The user therefore has no obligation to maintain the return flows if he can put the water previously lost as seepage to the same beneficial use (here, irrigation) on the same land. See also 1 Wiel, *supra*, §§ 57-58, at 54, 56 (stating that "[w]aste water soaking [to another's land] after irrigation need not be continued," and noting that "the principle is entirely the same" for seepage), cited in *Binning*, 102 P.2d at 60.

2. Montana suggests (Br. 49) that these more efficient uses should be deemed second-tier rights under the first sentence of Article V(B). That sentence provides that in allocating the water that was "unused and unappropriated" at the time of the Compact, the first portion goes "to provide supplemental water *supplies* for the rights described in [Article V(A)]." 65 Stat. 666 (emphasis added). Neither the text nor the history of Article V(B) supports Montana's interpretation. See-

ond-tier rights are relevant only when a first-tier user's pre-1950 water right was insufficient to supply the existing irrigated acreage fully, and the user appropriated an additional supply after 1950 to supplement the existing right. The legislative history confirms as much. See S. Rep. No. 883, *supra*, at 7 (federal representative's report) ("[E]xisting irrigation developments with an inadequate *supply* should have a preferred right to the unused remainder over new projects.") (emphasis added); accord *id.* at 2, 11; H.R. Rep. No. 1118, *supra*, at 3.

Montana's allegation, by contrast, involves a water user who diverts no more water today, and irrigates no more acreage today, than he did in 1950; he simply *returns* less water and puts more of the diverted water to productive use on the same acreage. That more productive use does not mean that the 1950 water supply was inadequate; changing crops, for example, may cause more of the diverted water to be consumed rather than returned. Making more complete use of an unchanged diversion does not constitute drawing on a supplemental "supply."

Although this allegation by Montana fails to state a claim, it is presented as one of several alternative factual bases for Montana's claim of a Compact violation. Its deficiency, therefore, does not warrant granting the motion to dismiss.

CONCLUSION

The motion to dismiss the complaint should be denied.

Respectfully submitted.

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MAY 2008

APPENDIX A

YELLOWSTONE RIVER COMPACT COMMISSION
Engineering Committee
Billings, Montana

October 23, 1950

Mr. R. J. Newell
P.O. Box 1866
Boise, Idaho

Dear Mr. Newell:

At the joint meeting of the drafting and engineering committees of the Yellowstone River Compact Commission held in Billings, Montana on August 22-23, 1950, the engineering committee agreed to recommend a basis for the Yellowstone River Compact. This subject has been carefully considered by the committee, which herewith submits its report and recommendations.

It is a generally accepted fact that irrigation development in the Yellowstone River Basin, particularly on the interstate tributaries, has very nearly reached its maximum practicable limit without the provision of additional new storage capacity. The committee feels that clearing the way for this new storage should be the underlying objective of any interstate Compact. From an interstate standpoint, the situation in the Yellowstone River Basin is extremely favorable since on three of the four interstate tributaries there is a reservoir site at or near the State line which can provide adequate control of residual flows from the upper State for continued development in the lower State. The fourth tributary, Clarks Fork, is not likely to experience water shortage. The reservoir on Tongue River has already been constructed, and

those on the Big Horn River and the Powder River are authorized by Congress for construction by the Bureau of Reclamation. When these reservoirs are in operation they will have the practical effect of permitting full development in the upper States without affecting the progress of development in the lower States. The fact should be borne in mind.

Concerning treatment of existing developments in the Compact, the committee is of the opinion that there is little to be gained from a water supply standpoint by regulating and administering existing diversions under a Compact. It is, of course, entirely up to the Commission whether or not existing rights are to be administered under the Compact, but from an engineering standpoint, the committee feels that the expense and difficulties of such an administration would in no way justify the benefits that might be obtained. There are insufficient data upon which to base this type of administration due principally to differences in the water laws of the States involved. It would be a major research project to place existing rights in all States on an equivalent basis. Such procedure undoubtedly would involve interstate adjudication proceedings.

There are two principles upon which a satisfactory allocation of the unused waters of the Yellowstone River could be based. One is the so-called divertible flow principles, which has been used in previous Yellowstone River Compact attempts. The other is the depletion principle as used in the Upper Colorado River Basin Compact. The committee feels, that since the divertible flow principle has been previously used as a basis for a compact, it should be retained, but modified to make the apportionment operative on other than a daily basis so

that allocation could be in terms of cumulative volumes of water through an entire year, or portion thereof rather than by daily stream flow. This is because substantially all new development will be based on storage rather than direct flow. A suggested draft of an apportionment article is attached, together with the supporting definitions.

Whatever principle is used in allocating the water under the Compact, it is necessary to select some index upon which to base apportionment, either directly in acre-feet or by percentage. The committee believes that the most practicable basis of apportionment of the unused water is the area of irrigable land in the States. The irrigable lands in the States are tabulated in the report and the addendum, dated September 27, 1950, of the engineering committee. The committee feels the irrigable lands as shown by this report and addendum are a reasonable measure of the new development that is likely to take place in the basin for a long time to come.

If the Commission feels that the available data are insufficient on any of the interstate tributaries (Clarks Fork, Big Horn, Tongue, or Powder Rivers) to allocate all of the unused waters of that tributary, it could apportion a first block of water sufficient to take care of the presently indicated potential development.

Some consideration must be given to supplemental water supply and since such water is for use on existing projects, it is felt that such allocation should be made under the category of existing irrigation works rather than potential.

The committee definitely feels that there is enough information available at the present upon which to base a workable and realistic Compact, and that nothing would be gained but much might be lost if a Compact were postponed until all the development possibilities in the basin are completely and thoroughly studied. This will take a long time and cost a great deal of money, and if a Compact is delayed until it is completed, the basin may well be deprived of the use and benefit of many worth-while projects which otherwise could be constructed.

Sincerely yours,

(Signed)
Fred F. Buck

(Signed)
Earl Lloyd

(Signed)
J. J. Walsh

(Signed)
W. S. Hanna

(Signed)
Carl L. Myers

Attachment

Copy to: Each Commission Member
(with attachment)

APPENDIX B

YELLOWSTONE RIVER COMPACT COMMISSION

Minutes of Meeting
Oct. 24-25, 1950

The third meeting of the Yellowstone River Compact Commission was held at the Northern Hotel in Billings, Montana, on October 24 and 25, 1950, and was called to order at 10:05 a.m. by R. J. Newell, Chairman. Mr. Ed Parriott and Mr. Chris Josephson were announced as new Commissioners for Montana and Mr. Harry Littlefield as a new Commissioner from Wyoming.

The Chairman pointed out that the minutes of the second meeting had been distributed and asked if there were any corrections. Mr. Johnson moved that the minutes be approved. The motion was seconded and carried.

The Chairman outlined the general situation in which the Commission finds itself. Specific principles had not been adopted at the last meeting to guide Mr. Burke in the preparation of a work draft which he was requested to prepare and did prepare. Subsequently, the Drafting Committee met with the Engineering Committee, but no single draft of Compact was agreed upon.

The Chairman then called on Mr. Leonard for his views on the present status of the work of the Drafting Committee. Mr. Leonard reported that no meeting had been held, except the one early in August, when the Committee met with the Engineering Committee and advisors in Billings. At that time the basic principles were discussed, and it was agreed that Messrs. Leonard and McNally would each prepare a draft. The Commit-

tee was unable to agree on basic principles, and the Leonard and McNally drafts proved to be diametrically opposed at many points, with no basis for agreement. Mr. Leonard then discussed the history of Compact negotiations and spoke of a proposed compact prepared in 1935, signed by Messrs. Lamb, James, and Burritt. This proposed Compact was based on the doctrine of appropriation. Mr. Leonard then discussed the question of storage construction, mentioned the Wyoming-Nebraska-Colorado suit and its settlement on the basis of appropriation. He pointed out that the Supreme Court had left open in this suit the question of whether the United States owns the unappropriated water in the stream.

The Chairman then asked Mr. Acker for his views. Mr. Acker stated that the provision proposed with respect to North Dakota seemed to be agreeable to Montana and Wyoming. It applied to streams which were out of reach of Montana and Wyoming. He stated that he had reviewed a good many decisions of the Supreme Court and believed that the Court had laid down the firm proposition of "equitable apportionment," but had not laid down the specific principles for general application. He believed that the states could agree on a Compact and that they could better do justice to the area involved than could an authority or some other agency. He raised the question as to whether the Commission was attempting to apportion the natural flow only or whether its apportionment covered all the water, including stored water.

The Chairman then called on Mr. McNally. He said that he had before him three suggested drafts of Compact and that a fourth would be mentioned a little later. He discussed briefly the points of disagreement between

himself and Mr. Leonard with respect to the Tongue River. The first filing on the Tongue River in Wyoming was in 1879, and by 1886 there were filings on 45,000 acres. The first Montana filing was made August 9, 1886. The Wyoming Constitution provides that water arising in Wyoming belongs to the state. However, because of the interstate nature of the streams constituting the Yellowstone River system, the state may have to surrender some of its rights to this water.

Wyoming is trying to recognize existing rights. On the Tongue River it would have the first right to water for 45,000 acres. The water would then go to Montana, but for use 150 miles down stream. In the Laramie River case the Supreme Court held that it would protect junior rights where the economy was dependent thereon and where the distance to down stream point of use by senior rights would result in waste of water through channel loss. It held that a lower state should take advantage of storage possibilities and construction of storage works.

In application to the Tongue River situation Mr. McNally pointed out that the Tongue River Reservoir which has been constructed complied with the holding of the Court that storage possibilities should be developed. Mr. McNally then reviewed briefly the principal draft articles, Article V prepared by Myers, Article III by McNally and Wehrli, and Article III prepared by Leonard, which cover protection of existing rights and division of water. He then suggested hearing from the Engineering Committee.

Mr. Myers reported for the Engineering Committee that at the joint meeting held with the Drafting Committee in August two jobs were given to the Engineering

Committee. The first job was to analyze the situation on the Bighorn River to determine whether the "potential" and "possible" acreages given in the Engineering Report were correct, and if not to determine proper acreages. The Committee took a field trip in September covering the entire Bighorn River Basin and submitted its report, as an addendum to the original report, by letter of September 24, to the Chairman of the Commission.

The second job given the Committee was to attempt to prepare an article for inclusion in a draft of compact covering the apportionment of water. The Committee spent considerable time on this problem with the help of Mr. H. T. Person, Dean of Engineering at the University of Wyoming, and an Engineering Advisor to the Wyoming Commission, and Mr. J. R. Riter, Chief of Hydrology Division, Bureau of Reclamation. Two principles were considered for use in the preparation of the draft. The first is the depletion theory used in the Upper Colorado River Compact, which places a ceiling on the beneficial consumptive use of water permitted in each state. The second is the divertible flow theory which limits the amount or percentage of total amount of water which can be diverted in a state. The Committee believed that a modification of the divertible flow principle was most appropriate in this case, this being the principle considered in all previous compact negotiations on the Yellowstone.

Mr. Myers then read a letter to the Chairman of the Commission dated October 23, 1950, which discussed the opinion of the Engineering Committee in respect to this matter and transmitted a suggested draft of an apportionment article. Copies of the letter were distributed to those present. Mr. Leonard inquired whether the

draft prepared by the Committee proposed to affect existing rights or only unappropriated water. There was discussion by Messrs. Myers, Leonard, Bower, Vernon, Acker, Bunston, and others. Messrs. Bunston and Lloyd discussed the necessity for a compact before storage development could proceed.

At 11:30 a.m. the Chairman called a recess.

The Commission reconvened at 1:15 p.m.

Mr. Leonard moved that the report of the Engineering Committee be laid on the table. Mr. Acker questioned the advisability of tabling the report, and thus withdrawing it from consideration. He spoke of the need for a Compact, but the important matter for discussion was the division of water. Mr. Leonard's motion was withdrawn.

Mr. Acker moved that the October 23, 1950, report of the Engineering Committee be adopted and approved by the Commission. The motion was seconded by Mr. McNally. Mr. Jones stated that the Montana Commissioners would be willing to abide by the decisions reached at the February meeting. He suggested an examination of the Engineering Report in the light of these decisions. Mr. Bunston stated that the people on the Bighorn River in Montana did not agree to accept the acreages in the Engineering Report as a basis for the division of water, but would be willing to consider the report in arriving at proper percentages. He read a statement giving the position of the Bighorn people in Montana and objected to the inconsistent data as to "potential" and "possible" irrigable acreages in the Bighorn River Basin. Mr. Thornton suggested that the data presented by the Engineering Committee were probably as accurate as could be developed at this time and that they be used as a ba-

sis for division of water. There was discussion by Messrs. Bunston and Bower.

Mr. Myers outlined in some detail the method of derivation of data in the original report, the reasons why that report was felt to be inaccurate in some respects, the procedures followed by the Committee in modification, and the basis for the information in the addendum. There was discussion of certain details. Mr. Vernon outlined in general the plan of the Missouri River Basin Project for development on the Bighorn.

Mr. Acker questioned whether there was not some confusion as to which report was before the group for consideration and stated that his motion covered the October 23 report which suggested a basis for apportionment of the water and included as an attachment a draft article on apportionment.

Mr. McNally inquired what information Mr. Bunston and the Bighorn group from Montana would require in order to be able to agree on acreage figures.

There was discussion as to whether the Engineering Committee Report being considered by the group included the draft of Compact article. Mr. Leonard said that no Compact could be signed that asked Montana to give up rights to water now in use in Montana. Mr. Acker asked for a specific proposal, but Mr. Leonard replied that they would insist on recognition of the doctrine of appropriation.

There was discussion of the terms of the agreements reached in February, and whether they are still applicable. Messrs. McNally and Leonard agreed that the February provisions could still be adhered to, but there was some disagreement as to details.

Mr. Burke pointed out that the Report of the Engineering Committee contained 20 specific questions, and that it was not wise to try to consider the report as a whole without identifying the individual problems. He read particularly items in the third paragraph which contained problems 7 to 11. In this paragraph the Committee has made a recommendation as to the method of handling vested rights, a problem which will have to be solved by the Commission. Mr. Burke then discussed the claim of the United States to the water of interstate streams and the history of the claim and of court decisions which bear on the matter.

After a short recess Mr. Leonard thanked Mr. Burke for his discussion and suggested that he draft a suggested division of the water which could be presented to Montana and Wyoming, following which the Commission could meet and adopt the draft. Mr. Acker withdrew his motion with the consent of the second.

Mr. Acker moved that the Report of the Engineering Committee be adopted in principle only and that the points analyzed by Mr. Burke be considered individually. Mr. McNally seconded the motion. Mr. Newell asked Mr. Burke whether he now had adequate information from the Commission on which to base a draft of Compact. Mr. Burke stated that he had neither the information nor the time. The Chair called for a vote on the motion, and, Montana being opposed to the motion, it was declared lost.

There was discussion as to the basis for voting, and it was generally agreed that the vote must be taken by states, each state having one vote.

Mr. Acker moved that the Report of the Engineering Committee be received for consideration and possible

adoption of each of the principles stated. The motion was seconded by Mr. McNally and passed.

The items as identified by Mr. Burke in the Engineering Committee letter were considered as follows:

1. It is a generally accepted fact that irrigation development in the Yellowstone River Basin, particularly on the interstate tributaries, has very nearly reached its maximum practicable limit without the provision of additional new storage capacity.

It was moved and seconded to adopt this item, and the motion was carried.

2. The committee feels that clearing the way for this new storage should be the underlying objective of any interstate Compact.

It was moved and seconded that the item be adopted. Upon objection it was moved to amend the motion to insert the words, "one of" between "be" and "the" and change the word, "objective" to "objectives." The amendment was carried, and the motion as amended was carried.

3. From an interstate standpoint, the situation in the Yellowstone River Basin is extremely favorable since on three of the four interstate tributaries there is a reservoir site at or near the State line which can provide adequate control of residual flows from the upper State for continued development in the lower State.

4. The fourth tributary, Clarks Fork, is not likely to experience water shortages.

5. The reservoir on Tongue River has already been constructed, and those on the Big Horn River

and the Powder River are authorized by Congress for construction by the Bureau of Reclamation.

As to each of these items individual motions that the item be adopted were made, seconded, and carried.

6. When these reservoirs are in operation they will have the practical effect of permitting full development in the upper States without affecting the progress of development in the lower States. That fact should be borne in mind.

It was moved and seconded to adopt this item. Upon objection, it was passed over.

7. Concerning treatment of existing developments in the Compact, the committee is of the opinion that there is little to be gained from a water supply standpoint by regulating and administering existing diversions under a Compact.

This item was passed over.

8. It is, of course, entirely up to the Commission whether or not existing rights are to be administered under the Compact, but from an engineering standpoint, the committee feels that the expense and difficulties of such an administration would in no way be justified by the benefits that might be obtained.

9. There are insufficient data upon which to base this type of administration due principally to differences in the water laws of the States involved.

10. It would be a major research project to place existing rights in all States on an equivalent basis.

11. Such procedure undoubtedly would involve interstate adjudication proceedings.

Mr. Leonard stated that it is Montana's position that there should be a provision in the Compact that existing rights shall be administered under the Compact by the Administrative Commission that may be established. Mr. McNally stated that Wyoming did not want such a provision. There was discussion of the problem. It was agreed that both states want existing rights recognized in the Compact. Mr. Burke suggested recognizing existing rights and providing that they be administered under state law. There was discussion of the relative merit of the two positions from the standpoint of protection of property rights. Mr. Acker suggested adding a phrase to provide that the Compact would "recognize vested rights under the doctrine of appropriation." Mr. Vernon moved that with respect to item 8 of the Engineering Report the Commission desires that (a) the Compact recognize existing vested rights and (b) the procedure for recognizing these rights not be changed. There was no second.

Mr. Bower moved to adopt items 6 to 11 inclusive. Mr. Leonard stated that Montana objected. There was further discussion. Mr. Burke stated that there seemed to be no question about recognizing existing rights, that the question was what body would enforce those rights, the Courts or a Compact Commission. Items 6 to 11 were passed over.

12. There are two principles upon which a satisfactory allocation of the unused waters of the Yellowstone River could be based. One is the so-called divertible flow principle, which has been used in previous Yellowstone River Compact attempts. The other is the depletion principle as used in the Upper Colorado River Basin Compact.

13. The committee feels, that since the divertible flow principle has been previously used as a basis for a compact, it should be retained, but modified to make the apportionment operative on other than a daily basis so that allocation could be in terms of cumulative volumes of water through an entire year, or portion thereof rather than by daily stream flow. This is because substantially all new development will be based on storage rather than direct flow.

14. A suggested draft of an apportionment article is attached, together with the supporting definitions.

There was discussion of the item. Mr. Thornton moved to adopt the divertible flow principle as modified in accordance with Committee recommendations. The motion was seconded. Mr. Leonard stated that he favored the divertible flow principle, but objected to modification. In the following discussion Wyoming proposed leaving the question of modification open for the present. By consent the group adopted the divertible flow principle as a basis for Compact, modification to be considered later.

15. Whatever principle is used in allocating the water under the Compact, it is necessary to select some index upon which to base apportionment, either directly in acre-feet or by percentage. The committee believes that the most practicable basis of apportionment of the unused water is the area of irrigable land in the States.

16. The irrigable lands in the States are tabulated in the report and the addendum, dated September 24, 1950, of the engineering committee.

17. The committee feels the irrigable lands as shown by this report and addendum are a reasonable measure of the new development that is likely to take place in the basin for a long time to come.

Mr. Bunston objected to the irrigable land figures on the Bighorn as given in the Committee Report and addendum. It was moved to adopt the principle of using "potential" and "possible" irrigable land as the index to determine the percentage apportionment. There was no second. It was moved to adopt item 17. The motion was seconded. Following discussion, it was moved to add after the word, "addendum" the expression, "except as to the Bighorn River." The motion was seconded and carried, and the motion as amended was carried.

18. If the Commission feels that the available data are insufficient on any of the interstate tributaries (Clarks Fork, Big Horn, Tongue, or Powder Rivers) to allocate all of the unused waters of that tributary, it could apportion a first block of water sufficient to take care of the presently indicated potential development.

This item was passed over.

19. Some consideration must be given to supplemental water supply and since such water is for use on existing projects, it is felt that such allocation should be made under the categoryof existing irrigation works rather than potential.

It was moved and seconded that this item be adopted, and the motion was carried.

20. The committee definitely feels that there is enough information available at the present upon which to base a workable and realistic Compact, and

that nothing would be gained but much might be lost if a Compact were postponed until all the development possibilities in the basin are completely and thoroughly studied. This will take a long time and cost a great deal of money, and if a Compact is delayed until it is completed, the basin may well be deprived of the use and benefit of many worth-while projects which otherwise could be constructed.

This item was read as a statement, but not put as a question.

The meeting recessed at 5:45.

The meeting reconvened at 8:35 p.m. Mr. Leonard discussed the numerous meetings of the Commission that have been held and the numerous drafts of compacts. He stated that the draft prepared by Messrs. McNally and Wehrli and presented by Wyoming was wholly unacceptable to Montana and gave the reasons therefor. He concluded that the Commission was not approaching agreement and stated that if the Commission could not come nearer agreement, he was prepared to move that the Commission adjourn permanently.

Mr. McNally pointed out that the McNally-Wehrli draft is not before the group, that it is the Engineering Committee's draft which is before the group. The Chairman brought up for consideration the Engineering Committee's draft and asked Mr. Burke to conduct the discussion. Mr. Burke outlined the provisions of the draft article and proceeded to take up the article by sections.

There was agreement on the first paragraph of the article, reading as follows:

"The waters of the Yellowstone River System, exclusive of existing development and other uses coming within the provisions of paragraph C of this Article __, are hereby allocated to each State for storage or direct diversion as follows:

Clarks Fork River

To Wyoming ____%
To Montana ____%

Big Horn River

To Wyoming ____%
To Montana ____%

Tongue River

To Wyoming ____%
To Montana ____%

Powder River

To Wyoming ____%
To Montana ____%

subject to the following stipulations concerning the point of measurement:"

The provision as to point of measurement on Clarks Fork was agreed on as follows:

"1. For the Clarks Fork River the point of measurement shall be below the last diversion from Clarks Fork River above Rock Creek."

There was discussion as to the point of measurement on Bighorn River, as to which the Committee's draft provided as follows:

"2. For the Big Horn River the point of measurement shall be below the last diversion from the Big

Horn River and the inflow from the Little Big Horn River shall be excluded from the quantity of water subject to allocation."

Mr. Bunston suggested that the point of measurement be at a point at the state line or at a point just above the Little Bighorn River. Mr. Leonard objected to measurement for division except at the state line on any tributary and also objected to excluding existing rights.

Mr. Burke discussed the preparation of the report by the Committee, on which the state engineers of the three states constitute a majority. He expressed his feeling that the group should have confidence in the report representing the best judgement [*sic*] of the three state engineers who are men of long experience and high standing. He urged that the engineering matters discussed in the report and recommended by the Engineering Committee not be tampered with by the group. There was restatement of suggestion by Mr. Leonard. Mr. Person pointed out that the Commission is attempting to divide the entire water produced in the basin, not just the water produced in Wyoming.

Mr. Acker inquired of Mr. Leonard precisely what the problems were that called this Compact negotiation. Mr. Kurtz spoke of the history of a previous compact and its consideration. He pointed out the importance of drafting a compact and having it approved and some of the problems to be resolved.

Mr. Bunston agreed that the problem is one of dividing the water of the basin, not just that which arises in Wyoming. As to the division of the water, he believed that a "block" division can be effective—probably the first block on the basis of the engineering report and the remaining block, after serving existing and potential

irrigation, to be subject to appropriation by both states. As to the point of measurement, he suggested that it be at the Hardin Bridge just above the mouth of the Little Bighorn River.

Following a review by Mr. Burke of Mr. Bunston's proposal, there was a discussion of the proposal by Messrs. Vernon, Bunston, and Burke. Mr. Burke stated the proposition that "potential" developments be divided on the basis of acreage in the engineering report, and that "possible" acreage be included but percent not stated.

Mr. Bunston moved that the group favor compacting unappropriated water on the divertible flow theory using for percentages as to potential acreages the figures in the engineering report, and as to possible acreages, figures to be determined later. Mr. McNally seconded the motion. There was an objection by Mr. Leonard as to adopting this motion. Mr. Bunston suggested that the question as to the theory proposed be subject to further consideration.

There was discussion as to the point of measurement and the relationship between various points of measurement and percentages apportioned. On a question by Mr. Bunston, Mr. Burke stated as his opinion that the draft article by the Engineering Committee was the best method of accomplishing the development of the area. There was further discussion of the recognition of existing rights.

Mr. Thornton moved that the Engineering Committee Report be tentatively adopted as to measuring points on all streams. The motion was seconded. Mr. Leonard objected. Mr. Jones spoke of the problem of voting—the necessity of the Commissioners from a state

voting as a unit. He expressed regret that the Montana group had not met to agree on various points. He stated that Montana will insist on recognition of Doctrine of Appropriation and some method of caring for periods of low flow.

Mr. Thornton asked to recess to the next morning. Mr. Leonard again stated his proposal that unless Wyoming suggested some other basis for a compact, there appeared to be no basis for agreement. Mr. McNally again stated that no Wyoming proposal is before the Commission, that Wyoming will be satisfied with any one of several paragraphs submitted providing for the apportionment of water. Mr. Williams stated that he was tired of hearing the discussion apparently getting nowhere and was going to leave. It was moved and seconded to recess. The motion was carried and at 11:00 p.m., the Commission recessed until the next morning.

The meeting reconvened at 9:40 a.m. on October 25, 1950. Mr. Newell asked whether further discussion of the Engineering Committee's Report was desirable. The tentative approval such as had been given the specific items of the report would hardly bind a Commissioner to sign the compact when prepared.

Mr. Bunston read a letter addressed to Mr. Newell, copy of which is attached.

There was discussion of the method of division of Bighorn River waters. It was pointed out that there was substantial agreement on potential irrigation possibilities on the Bighorn as presented in the Engineering Committee's Report.

Mr. Leonard stated that he could not agree to Mr. Bunston's proposal to turn over to the Engineering

Committee the problem of drafting a compact for the signature of the Commissioners nor to the suggestion that laymen on the Commission be supplanted by engineers. Mr. Bunston stated that he did not by any means intend to imply any requests for the resignation of any members of the Commission. His comments were submitted in view of the nearness of the legislative sessions in Wyoming and Montana, and because of the fact that the job of drafting the compact was largely a technical engineering job. Mr. Williams stated that although he had no official status in the meeting he wished to offer as his opinion that he agreed with Mr. Bunston. The Engineering Committee should be capable of drawing a compact. If it were then found not satisfactory it could be reviewed in the legislatures.

Mr. Cochrane asked whether all the tributaries needed to be considered in a draft or whether a compact could be drawn covering some streams and omitting others. He stated that the Bighorn River group wants a compact so that it can go ahead with developments even if some of the tributaries can not agree on compact provisions.

Mr. Jones asked for a statement from Wyoming as to some specific proposals to which they felt Montana might agree. Ten minutes recess was taken. Following the recess Mr. Leonard called attention to the fact that North Dakota was not represented in this day's sessions and that no action was possible without them. He hoped that Wyoming would submit a draft of a compact which would be agreed upon. No agreement can be reached on dividing the basin and compacting individual streams. The basin must be covered as a whole.

Mr. Bunston stated that he was not in favor of adjourning or having anybody resign. If it is found that a compact can not be drafted to cover all the tributaries he would like an opportunity to see what can be done on the Bighorn.

Mr. Newell discussed the various drafts which were available for consideration. No one draft had been submitted by the Drafting Committee. Mr. Burke had prepared a preliminary work draft for the use of the Drafting Committee. Messrs. McNally and Wehrli had prepared a draft representing a Wyoming view. Mr. Leonard had prepared a draft representing his views. Copies of the Leonard and Burke drafts were distributed.

Mr. Lloyd moved to recess into river groups to try to reach agreement and report back shortly after noon. There was no second. Mr. Leonard asked what Wyoming thought of the Burke draft. He stated that he felt it covered the agreements reached in February but that it should cover the manner of settling disagreements in questions of interstate administration. Mr. Bunston moved to consider the Burke draft paragraph by paragraph.

Mr. McNally referred to the draft paragraph in the Engineering Committee's Report and to corresponding paragraphs in the Leonard draft, McNally-Wehrli draft and a Myers draft. He stated that Wyoming would not agree to interstate administration. He read from the draft paragraph by the Engineering Committee and stated that Wyoming wanted division of the water on an annual basis as provided for in this draft. He then read from a paragraph of the Myers' draft which used as a basis for division of water the allocation of beneficial consumptive use on an annual basis, October to Septem-

ber, placing a ceiling on the amount of water which can be consumptively used in each of the states. He read from the McNally-Mehrli draft which also provided for division on the consumptive use basis and from the Leonard draft which provided for the application of the Doctrine of Appropriation on an interstate basis. Mr. McNally stated that he objected to interstate administration. He stated that he would insist on "equitable apportionment" which includes priorities and other factors. He stated that if agreement could be reached on the language to be used in the article, of which he read from several examples, and on the question of interstate administration, then agreement could be reached on a compact.

In answer to a question Mr. Newell explained that the Myers draft was a draft prepared by Mr. Myers utilizing as a basis the Burke draft and substituting in the appropriate place the principle of apportionment on the basis of consumptive use rather than apportionment of divertible flow. This draft was prepared for the use of the Engineering Committee. Copies were furnished only to members of that Committee. When the Committee considered the draft it leaned toward the divertible flow method and prepared its own draft which was presented to the Commission.

Mr. Jones agreed that the basis of division of water is the essential feature to be decided. He felt that there should be some machinery for discussion of problems which would arise under the compact either through a Commission, through the state engineers or by some other means which should be provided for in the Compact.

Mr. Leonard insisted that under the Doctrine of Appropriation state lines must be wiped out. He insisted on recognition of established rights under interstate administration, and on apportionment of natural flow, not storage.

Mr. McNally moved to remove the Tongue River from compact consideration and let the Commission proceed to consider the Bighorn, Powder and Clarks Fork. Mr. Kurtz seconded the motion. The Chairman called for discussions. Mr. Kurtz discussed the situation existing on the Tongue River which results in problems differing from those on the other tributaries and may necessitate excluding the Tongue from consideration. He called attention to a portion of Mr. Leonard's draft relative to the division of water and particularly the statement reading ". . . in accordance with the general law governing the acquisition and use of water . . ." He pointed out additional language in the draft which it seemed to him tended to modify or restrict this statement and called attention to the importance of agreeing on major items and delegating to others the resolution of details.

Mr. Leonard discussed some of the questions raised. He spoke particularly of previous proposals to exclude the Tongue River and read from a letter prepared in 1945 pointing out in detail reasons for not excluding the Tongue. There was discussion between Messrs. Kurtz and Leonard relative to points of agreement and disagreement on the Tongue River.

In response to comments relative to having the courts, not a Commission, determine certain matters of Administration, Mr. Muggli stated that he wanted to avoid law suits if possible, that he was a practical irri-

gator and believed that from the standpoint of a practical irrigator the question of dividing water between upstream and downstream users could be resolved on a friendly basis.

Mr. Vernon suggested that there seemed to be some basis for agreement which should be explored.

At 11:45 a.m. the meeting recessed.

The meeting reconvened at 1:50 p.m. Mr. McNally spoke on the general subject of administration of the compact. He stated that Wyoming did not want a "super-government" and control by two non-residents such as might occur with a board of three persons. He stated that in his opinion Article VI of the Snake River Compact presented a satisfactory form, with modifications to suit the differing situation. This article in its unmodified form is as follows:

> "C. In the case of failure of the administrative officials of the two States to agree on any matter necessary to the administrationof this Compact, the Director of the United States Geological Survey, or whatever official succeeds to his duties, shall be asked to appoint a Federal representative to participate as to the matters in disagreement, and points of disagreement shall be decided by majority vote."

Mr. Newell asked Mr. Vernon whether he considered that a U. S. Geological Survey representative, as suggested in the Snake River Compact was a logical person for Federal representative. Mr. Vernon stated that he did; that he felt it should not be a Bureau of Reclamation representative because of the Bureau's direct interest in projects with respect to which decisions on administration of the stream would be made. Mr. Leonard stated

that he preferred the Bureau of Reclamation representative, but suggested that nothing be placed in the Compact which would restrict the judgment of the President in making an appointment. He suggested that North Dakota not be a part of the administrative body, there being little opportunity for controversy involving North Dakota.

Mr. McNally objected to the provision that the Commission might change the apportionment as provided for in a portion of Article IV of the Leonard draft reading as follows:

> "From time to time the Commission between Wyoming and Montana shall re-examine the allocations herein made and upon unanimous agreement may make modifications therein as are fair, just and equitable, giving consideration among other factors to:
>
> Priorities of water rights;
>
> Acreage irrigated;
>
> Acreage irrigable under existing works; and
>
> Potentially irrigable lands."

Mr. Leonard suggested that the language be changed to provide that the Commission might "recommend" modification. There was general agreement. Mr. Leonard stated that he had been told by Mr. Acker that North Dakota was agreeable to not being represented on the administrative commission.

Mr. Thornton suggested that the Engineering Committee should be given an opportunity to hear the ideas of the group on specific articles of a compact in order to be in a position to draft a compact.

The Chairman called for a vote on the motion to exclude the Tongue River. The motion was lost. There was discussion of whether the Engineering Committee should be asked to draft a compact. Mr. Bower moved that the Commission ask the Engineering Committee, with the advice and assistance of Mr. Burke, to prepare a draft of proposed compact for presentation at an early date. The motion was seconded and carried. Mr. Leonard stated that he agreed that the Engineering Committee might properly draft a compact if given adequate instructions but he did not want the Committee to undertake this task if it was permitted to insert its own ideas of policy.

Mr. Bower moved that the Commission consider the Burke draft. The motion was seconded and carried. There was no objection with respect to the preamble or Article I.

Article II: It was suggested that unnecessary definitions be excluded at the discretion of the Committee. It was agreed that in Article II, (C), (D), and (F) where necessary the Little Bighorn River should be expressly excluded from the compact. It was pointed out that tributaries lying within Yellowstone Park must also be excluded. The type of instructions to be given to the Committee were discussed. Mr. Myers asked specifically whether the Commission wanted to operate on a daily basis or on an annual basis, subject to check as required. Mr. Bower moved to have operations on an annual basis with provisions to make a check at any time desirable, but not required on a daily basis. The motion was seconded. In respect to a question, Mr. Buck stated he agreed to the annual basis with provision to check as required. The motion was passed.

Article II (J), (K): To be dropped.

Article III: Mr. Leonard suggested substituting Article IV of his draft for Article III of the Burke draft. Article IV of the Leonard draft was read by paragraphs and discussed. It was agreed to modify the first paragraph beginning after the comma in the eighth line so that the balance of the paragraph would read as follows:

> "and one representative selected by the director of the Geological Survey or whatever Federal agency may succeed to the functions and duties of that agency to be appointed by him at the request of the states to sit with the Commission, and who shall, when present, act as Chairman of the Commission without vote except as herein provided."

The second, third, fourth, fifth, and sixth paragraphs of the article were approved. It was moved, seconded and carried that the seventh paragraph be omitted and the same action was taken in respect to the eighth paragraph. The ninth paragraph was approved as previously amended to provide that the Commission might recommend modification in allocation. The tenth and eleventh paragraphs were approved. It was moved, seconded, and carried that Article IV of the Leonard draft as changed, be substituted for Article III of the Burke draft. It was moved, seconded, and carried that old Article III (D) of the Burke draft be added to the new Article III (modified Article IV of the Leonard draft).

Article IV of the Burke draft was approved.

Article V: It was suggested that the article in the Engineering Committee report be substituted for Article V. There was discussion on this article and of Article III of the Leonard draft, principally paragraph 2 there-

of. There was discussion of the language, the theory of Doctrine of Appropriation, and whether adding separate reference to the use of priorities in single streams regardless of state lines materially affected the sense of the paragraph. Mr. Leonard moved that paragraph 2 of Article III of the Leonard draft, with suggested modifications, be substituted for Article V of the Burke draft. The motion was seconded and after discussion, withdrawn. Mr. Bunston moved that the Engineering Committee should use in its draft the language in the Burke draft which appears as the first paragraph under the discussion of Tongue River, for each of the interstate tributaries included in the Compact, with this amendment: to strike the period after "appropriations" add a comma and "including the principle of priority, regardless of state line". Motion was seconded by Mr. Jones. There was discussion following which the motion was modified to eliminate the amendment to the language. The motion was passed.

It was moved, seconded, and carried to include as a separate article of the Compact, the following:

> "No sentence, phrase, or clause in this Compact, or in any provision thereof, shall be construed or interpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact."

Article V (D): It was agreed that the percentages agreed to in February, and with respect to the Bighorn. determined from the addendum to the engineering report, would be used.

Article VI: Agreed to eliminate.

Article VII: Mr. Humpherys read the following language which he had been authorized by the Commissioner of the Bureau of Indian Affairs to propose.

> "Nothing contained in this compact shall be so construed or interpreted as to affect adversely any rights to the, use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian Tribes and their reservations."

It was moved, seconded, and carried that the language be adopted.

Article VIII to end: Accepted.

Following discussion of Article XI, it was moved to adjourn subject to call of the Chairman. It was agreed that about two weeks would be allowed for study after the draft of Compact had been sent to the Commissioners. The motion was seconded and carried and the meeting adjourned at 5:55 p.m.

O. C. Reedy
Secretary

["Approved: R. J. Newell, Chairman
December 7, 1950"]

ATTENDANCE RECORD

October 24-25, 1950

Montana

Commissioners

Fred E. Buck

H. W. Bunston

John Herzog

Ashton Jones

A. Wallace Kingsbury

P. F. Leonard

Joseph Muggli

Ed F. Parriott

Keith W. Trout

Others

Wayne W. Linthacum

H. A. Williams

North Dakota

Commissioners

L. A. Acker

Einer Dahl

J. J. Walsh

Wyoming

Commissioners

Earl T. Bower

Ben F. Cochrane

E. C. Gwillim

E. J. Johnson

N. V. Kurtz

H. L. Littlefield

R. E. McNally

Mark H. Partridge

L. F. Thornton

Dr. M. B. Walker

Wyoming

Others

Earl T. Lloyd

H. T. Person

Others

R. J. Newell	–	Chairman, Federal Representative
O. C. Reedy	–	Secretary
C. L. Myers	–	Chairman, Engineering Committee—Bureau of Reclamation
W. S. Hanna	–	Member of Engineering Committee

W. J. Burke	–	Bureau of Reclamation
K. F. Vernon	–	Bureau of Reclamation
C.T. Judah	–	Bureau of Reclamation
Geraint Humpherys	–	Bureau of Indian Affairs
Firman H. Brown	–	Bureau of Indian Affairs
John G. Lightfoot	–	Corps of Engineers
D.F. Clemans	–	for D. F. Burroughs, National Park Service
E. L. Doeling	–	Fish & Wildlife Service
J. S. James	–	for Kirk. Sandals, SCS
J. Elliot Hall	–	Bureau of Land Management
R. A. Bethune	–	Reconstruction Finance Corp
R. E. Bodley	–	Adm. Assistant to U.S. Senator Zales N. Ecton

No. 137, Original

In The Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING and
STATE OF NORTH DAKOTA,

Defendants.

WYOMING'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS BILL OF COMPLAINT

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May 2008

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Mitchell Irrigation District v. Sharp, 121 F. 2d 964 (10th Cir. 1941) 8

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Texas v. New Mexico, 482 U.S. 124 (1987) 18, 23

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Arkansas River Compact arts. II, VII B, 63 Stat. 145 (1949) 21

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Pecos River Compact art. XIII, 63 Stat. 159 (1949) 21

Republican River Compact art. I, 57 Stat. 86 (1943) 20, 21

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WYOMING STATUTES

WYO. STAT. ANN. § 41-3-101 (2007) 7

TREATISES AND OTHER AUTHORITIES

A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES §§ 5:1, 5:5-5:8 (2007) 5, 7, 8

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Floyd A. Bishop, *Interstate Water Compacts and Mineral Development* (Administrative Aspects), 21 ROCKY MTN. MIN. LAW INST. 801, 802 (1975) 18

JEROME C. MUYS, INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL INTERSTATE COMPACT (National Water Comm'n 1971) 18

Laura Ziemer, Eloise Kendy, & John Wilson, *Ground Water Management in Montana: On the Road From Beleaguered Law to Science-Based Policy*, 27 PUB. LAND & RESOURCES L. REV. 75, 77 (2006) 27

Richard A. Simms, Leland E. Rolfs & Brent E. Spronk, *Interstate Compacts and Equitable Apportionment*, 34 ROCKY MTN. MIN. LAW FOUND. INST. § 23.02[2] (1988) 17

WYOMING'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS BILL OF COMPLAINT

STATEMENT OF THE CASE

The State of Wyoming ("Wyoming"), by and through its Attorney General, Bruce A. Salzburg, respectfully submits this reply brief in response to Montana's Brief in Response to Wyoming's Motion to Dismiss Bill of Complaint filed May 9, 2008, and the briefs of *amici curiae* the United States of America ("the United States") and the Northern Cheyenne Tribe ("the Tribe"), both filed May 16, 2008.

SUMMARY OF ARGUMENT

In its response to Wyoming's motion, the State of Montana ("Montana") contends that Section A of Article V of the Yellowstone River Compact[1] is a "depletion" provision, which obligates Wyoming to control its activities that could deplete river flows below a fixed quantity at the state line. Montana's Brief in Response ("Mont. Br.") at 11, 27-28. Montana bases this contention on the word "uses" in Section A of Article V. *Id.* at 28. When correctly parsed, however, the plain language of Section A does not support a depletion approach.

---

[1] Pub. L. No. 82-231, 65 Stat. 663 (1951) (Appendix A to Montana's Proposed Bill of Complaint) ("the Compact," cited below as "YRC").

Montana and the United States also argue that the phrase "shall continue to be enjoyed" in Section A should be read as an affirmative allocation or guarantee of water to satisfy each state's individual pre-1950 water rights. Wyoming, in contrast, contends that the drafters used that phrase simply to recognize these rights so that they remain in effect despite the division of water contained in Sections B and C. By recognizing these rights under the prior appropriation laws of each state, but not guaranteeing that water will be available to satisfy each of them, Section A contradicts the interpretation Montana, the United States and the Tribe suggest. Section A does not allow individual appropriators with pre-1950 water rights in Montana to make demands on post-1950 diversions or storage in Wyoming based on a non-existent guarantee.

As the Tribe admits, Sections A, B, and C are "inextricably linked." Tribe Br. at 9. Montana pre-1950 appropriations are, in fact, protected through the percentage allocation provisions of Sections B and C, which allow those pre-1950 appropriations to correct their deficiencies from water otherwise allocated to post-1950 Montana rights. On the Tongue and Powder Rivers, Section B allocates to Montana a minimum of 60% and 58% respectively of a running total of water available for post-1950 rights. Through its continuous rebalancing of post-1950 diversions in each state, the Compact ingeniously ensures that through any given date, Montana receives its

guaranteed percentage of "unused and unappropriated" water.

If Montana properly moves water from its post-1950 diversions to serve pre-1950 rights that are in need, the Compact automatically forces Wyoming to reduce its post-1950 diversions when necessary to keep Wyoming within its percentage limit. All flows in Wyoming that would cause Wyoming to exceed its share if diverted to post-1950 rights must be passed to Montana. Contrary to the arguments of Montana and the United States, the Compact does not allow Wyoming to divert and store water with impunity.

As all parties have agreed, the drafters anticipated that the states would build storage reservoirs. In fact, a primary motivation for the Compact was to remove impediments to reservoir construction. Such storage was the drafters' solution to a state's difficulty in supplying its pre-1950 rights because of timing of flows. Therefore, as long as an upstream state stays within its percentage allocation under Sections B and C, it is not responsible to solve the downstream state's timing issues by honoring direct demands by pre-1950 downstream appropriators. Such demands are not provided for in the Compact. The only Montana demand contemplated is one asserting that on a given date Wyoming has exceeded its cumulative annual percentage under Sections B and C. Montana asserts no such claim.

In discussing whether the drafters intended the Compact to regulate groundwater pumping, Montana and the United States improperly invite this Court to

rely on other language used by other states, in other compacts. The United States also argues that subsurface seepage from river channels that is later pumped from the ground is a "diversion" that is covered by the Compact. This interpretation is incorrect. The Compact only addresses surface water.

ARGUMENT

A. Montana's Depletion Interpretation of Article V, Section A Contradicts its Plain Meaning

Montana claims that Section A of Article V guarantees a specific quantity of water at its state line equal to what crossed that line in 1950, regardless of annual variations in surface supply. Mont. Br. at 11, 27-28, 29, 39-40. Montana bases this argument on the word "uses" in Section A. Wyoming submits that this is an improperly strained interpretation of the single sentence in Section A, which states:

> Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

YRC art. V, § A.

The subject of this sentence is "rights," and the verb phrase is "shall continue to be enjoyed." The

remaining words simply modify these two key components.

The "rights" that will "continue to be enjoyed" are "appropriative" rights. They are simply water rights that follow the general principle of western water law – prior appropriation. *In re Adjudication of the Existing Rights to the Use of All the Water*, 55 P.3d 396, 399 (Mont. 2002); A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES §§ 5:1, 5:5-5:8 (Thomson West 2007). "Appropriative rights," the subject of the sentence, is followed immediately by three phrases that modify it:

1. rights to beneficial uses of the water;

2. such water being of the Yellowstone River System; and

3. such rights existing in each "signatory State as of January 1, 1950."

The second and third modifiers may be disposed of simply. The second modifier provides that the "appropriative rights" are to water of the "Yellowstone River System," a term the drafters defined in Article II, D. The third modifier refers to rights "existing in each signatory State as of January 1, 1950." Therefore, as the United States agrees, "appropriative rights" as used in Section A are those established under the particular laws of each state as of January 1, 1950. This phrase negates any implication that under Section A the parties were to follow some new, tri-state prior appropriation law by which

interstate tributaries of the Yellowstone would be regulated without regard to state lines.

The verb phrase, "shall continue to be enjoyed," also confirms that the drafters intended Section A to continue intra-state regulation of appropriative rights on the rivers. As of 1950, both Montana and Wyoming regulated their appropriators' rights under their own prior appropriation laws and through their own regulatory authorities. There was no interstate law or regulatory body combining the laws of the three states to dictate how appropriative rights could "continue to be enjoyed." *Mettler v. Ames Realty Co.*, 201 P. 702, 704 (Mont. 1921).

The first modifying clause of "appropriative rights," is: "to the beneficial uses of the water." It is from this first modifying clause that Montana isolates the word "uses," and then converts it to the lynchpin of its depletion interpretation. Mont. Br. at 33. Under Montana's interpretation, the word "uses" is the subject of Section A, not part of a phrase that modifies its true subject. In order to make "uses" the subject, Montana argues that the drafters intended "uses" to be a noun synonymous with the concepts of quantity depleted or quantity consumed. *Id.* Montana thereby discards the subject of the sentence, "appropriative rights." "Uses" ceases to modify that subject.

However, "uses" has a much more logical role in the sentence that contradicts Montana's interpretation. The word "uses" does not stand alone, but is part of the phrase "beneficial uses," a well-understood

principle of appropriative rights water law. TARLOCK, *supra*, at § 5:30; WYO. STAT. ANN. § 41-3-101 (2007); MONT. CODE ANN. § 85-2-102 (2005). It denotes the *purposes* to which appropriators apply water that they divert. Montana, Wyoming, and other western states recognize water rights only for water applied to purposes or "uses" that the states consider beneficial. TARLOCK, *supra*, at § 5:66. The traditional core list of such purposes or uses includes irrigation, municipal, industrial, domestic and stock watering activities. *Id.*

The drafters' employment of the phrase "beneficial uses" in Section A is really of minimal consequence in interpreting that section. The purpose of most diversions from the Tongue and Powder Rivers since long before 1950 has been irrigation, a beneficial use of water under Wyoming and Montana law. *Id.*; *see also* Brief of the United States ("U.S. Br.") at 2-3, 29.

Irrigation is also a beneficial use under the Compact's own definition of that term. The drafters defined "beneficial use" "to be that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." YRC art. II, § H. Water diverted to irrigation, municipal, or industrial purposes is beneficially used under the Compact's definition, because water applied for those purposes is usually depleted to at least some extent when usefully employed by the activities of man. *See* Mont. Br. at 46.

The drafters did not modify "appropriative rights," with the phrase, "to beneficial uses," as Montana suggests, to establish a set quantity of water "used" or consumed by Montana appropriators in 1950. Rather, the phrase refers to the purposes to which appropriators must apply whatever quantity of water they are permitted to divert under their respective state's water law. The drafters merely confirmed that only legitimate state law appropriative rights – rights serving beneficial purposes – should be recognized in Section A and thereby incorporated by reference into the Compact.

There is a big interpretive difference between Montana's view that "uses" is the subject of Section A, and the positions of Wyoming and the United States that "appropriative rights" is the subject. It is axiomatic under western water law that an appropriative right is usufructuary, and not a traditional ownership right in the water itself. *Mettler v. Ames Realty Co.*, 201 P. 702, 704 (Mont. 1921); *Mitchell Irrigation District v. Sharp*, 121 F. 2d 964, 967 (10th Cir. 1941). A usufructuary right gives only a claim under which the appropriator can divert and apply water to a chosen beneficial purpose if and when water is available to satisfy the claim. TARLOCK, *supra*, at § 5:30.

When the drafters chose the language of Section A they simply recognized the existing usufructuary water rights in each state. They did not guarantee that any state would deliver a minimum quantity of water to match the amount that was "used" in a

downstream state in 1950. Therefore, this is not a depletion compact.

During negotiations in 1950, Montana attempted to amend Section A to provide for interstate demands "without regard to state lines," but the drafters rejected that attempt. Appendix to Wyoming's Motion to Dismiss ("Wyo. App.") at 64, 65. Montana criticizes Wyoming for providing detailed history of the Compact's drafting, contending that it is not "germane." Mont. Br. at 2, 19-23. On the contrary, those who actually drafted the Compact had the best grasp of what they intended. *New Jersey v. New York*, No. 120, 1997 WL 291594 at 24, 34 n.35 (U.S. Mar. 31, 1997), *received at* 520 U.S. 1273, *and reviewed at* 523 U.S. 767 (1998), *citing* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29-37 (1997). The drafters' formal vote against a depletion compact, their statement that they intended Section A to grandfather state law appropriative water rights, and their rejection of an interstate regulatory scheme proposed by Montana for Section A, are all important to the section's proper interpretation. Wyo. App. at 61-62, 65, 66; *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (extrinsic evidence appropriate to interpret compact terms). Montana's brief is silent on the content of any of the negotiations between 1940 and 1950, perhaps because that content contradicts Montana's current interpretation of Section A.

B. Legislative History Supports Wyoming's Interpretation of Section A

Montana does cite Senator O'Mahoney's committee report, asserting that it supports Montana's depletion interpretation. Mont. Br. at 27-29. The senator's report is important, but it actually supports Wyoming's view of the Compact. The senator wrote:

> V-A. Existing appropriative rights as of January 1, 1950, are recognized in each of the signatory States. No regulation of the supply is mentioned for the satisfaction of those rights, and it is clear, then, that a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion, is not contemplated, nor would such a demand have legal standing. Where these rights have deficient supplies they would be supplemented by rights obtained from "unused and unappropriated waters" in the basin as of January 1, 1950, from the allocated waters under subsection B.

Wyo. App. at 77.

Senator O'Mahoney observed that Section A recognizes each state's "appropriative rights" that existed as of January 1, 1950, not "uses" as Montana now argues. However, he also observed that Section A itself did not contain a mechanism to protect those rights outside of intra-state water law, and therefore created no basis for interstate regulation of supply to satisfy those appropriative rights. He explained that

if in the future the water supply became deficient compared to the 1950 supply, the drafters did not contemplate that the appropriators with pre-1950 rights could make demand on appropriators in an upstream state, and such a demand would have no legal standing. Instead, appropriators with pre-1950 rights suffering from deficiency would have to satisfy those rights from waters under Section B. Since no upstream demands are permitted, the Section B rights from which pre-1950 Montana appropriators could demand satisfaction would be Section B (post-1950) rights held within Montana.

C. Interstate Demands to Satisfy Individual pre-1950 Appropriations Violate the Compact's Integrity

The drafters rejected any interstate demands because the percentage allocation scheme of Section B and C obviates the need for such demands. The scheme fairly divides all the available surface water between the states each water year. On the Tongue and Powder Rivers respectively, Section B of Article V allocates Montana 60% and 58% of all water that either runs out of the rivers at the mouths, or is diverted or stored to post-1950 rights in both states. The percentage allocation is to be adhered to throughout the water year. If on any given date, Wyoming is in compliance with its allocation percentages, then at least 60% and 58% of the running total of the divertible flow will be available in Montana, undiverted and unstored by Wyoming. Montana

pre-1950 appropriators need only supplement their rights from this post-1950 water allocated to Montana under Section B in order to satisfy their claims.

Montana may say that its percentage of post-1950 water may not be available late in a water year because it has already allowed it to flow out the bottom of the river, released it from storage to post-1950 Montana appropriators, or diverted it to post-1950 Montana appropriators. Montana's problem, if there is one, is less about how the Compact equitably divides water, and more about timing of flows. However, the timing problem is not one contemplated by the Compact. As the United States agreed in its brief, the Compact adopts the "modified" (annual cumulative) divertible flow allocation. U.S. Br. at 19. It is not a daily divertible flow allocation under which demands can be made across state lines outside of the context of the Section B cumulative allocation.

The Compact's answer to Montana's timing complaint is storage. As Compact Commission Chairman Newell explained to Congress, construction of storage would fully protect pre-1950 appropriative rights. Wyo. App. at 83. Therefore, expecting that reservoirs would be built, the drafters did not provide for interstate demands to alleviate late-season deficiencies. The downstream states were expected to avoid timing issues by constructing storage or managing existing storage correctly.

Montana's interpretation that the Compact creates a cumulative percentage allocation, but also

allows demands by individual appropriators across state lines is an unfair one which was unacceptable to Wyoming's delegation. Wyo. App. at 63, 65. For example, according to Montana, one of its appropriators with a pre-1950 right who lacked natural flow from a river to fully satisfy that right late in the season could demand satisfaction from Wyoming storage, even if: (1) the Montana appropriator did not build the reservoir, (2) the Wyoming owner stored the water earlier in the year when other senior users on the river could not use it, (3) the amount stored did not put Wyoming beyond its cumulative percentage shares (40% or 42%) of Section B post-1950 divertible flow.

Under Montana's interpretation, its pre-1950 appropriators would have no incentive to build storage near the state line, or even in Wyoming as permitted specifically by Articles VII and VIII. YRC arts. VII and VIII (article VIII actually authorizes a downstream state to exercise eminent domain to build a reservoir in an upstream state). Moreover, Wyoming appropriators interested in constructing new reservoirs after 1950 would be discouraged from doing so if Montana could commandeer the water stored in them. If the drafters intended the Compact to allow Montana's pre-1950 appropriators to commandeer Wyoming storage through an interstate demand, it is unlikely they would have given Montana the right to build reservoirs in Wyoming.

As Wyoming conceded in its opening brief, if it has exceeded its Section B limitation on post-1950

diversions or storage at any time in the water year, it must immediately reduce its diversions for either direct use or storage, and allow enough water to pass to bring it back within its percentage, and thereby bring Montana back up to its percentage. Even then, Montana's demand would not come from one of its appropriators against Wyoming diverters. Its demand would be to enforce its percentage allocation governed entirely by Sections B and C. Upon such demand, both states would add up the total divertible flows and storage under the subsections of Section C, apply the percentages to the total, and determine if Wyoming is in compliance. To this day, Montana has never made such a demand under Sections B and C, and its Complaint does not address the mechanics of the Compact.

The Compact ingeniously self-corrects across state lines for drought years when post-1950 Montana diversions are regulated to satisfy Montana pre-1950 appropriative rights. When Montana satisfies deficiencies to its pre-1950 Montana rights by reducing diversions to its post-1950 Montana rights, by drawing on post-1950 storage, or by diverting water that would otherwise flow out the mouth of the river, this quantity is removed from the total annual divertible flow by definition. YRC art. V, § C (counting only post-1950 diversions and storage) This reduces the total annual divertible flow from what it would have been otherwise. If Montana corrects its pre-1950 deficiency at a time when Wyoming is up against its percentage limit of post-1950 diversions on the river,

Wyoming must reduce its post-1950 diversions to keep Wyoming in compliance. If, however, when Montana redirects water from its post-1950 diversions to its pre-1950 appropriations, Wyoming's total diversions and storage are less than its full percentage of post-1950 water, Montana's intra-state adjustment would move Wyoming closer to its percentage limit, which could have implications later in the year to Wyoming. In either case, Montana's in-state satisfaction of its pre-1950 rights *does* affect Wyoming.

If Montana cannot satisfy all of its pre-1950 rights by drawing on post-1950 diversions, storage or flow out of the mouth of the river even though Wyoming is in compliance, then Montana faces a timing problem from its failure to construct storage or manage its existing storage. If as Montana argues, it could turn to Wyoming appropriators to solve its timing woes, it could force Wyoming's diversions to post-1950 rights below Wyoming's guaranteed percentage allocations to those rights. Montana and the United States envision a double recovery when they assert that Montana is entitled to: (1) the protection of the balancing mechanism of percentage allocation, and (2) the right to make interstate demands by its individual appropriators even when the water is balanced. When read as a whole, the Compact fairly divides all surface waters between Montana and Wyoming only if the Court refuses to create a provision for interstate demands by individual appropriators. Wyo. App. 63, 65.

In summary, Section A of the Compact does not follow the depletion interpretation that would guarantee Montana a quantified or quantifiable flow in either river at the state line. Section A recognizes existing rights in each state and expects each state to continue to regulate those rights under its own laws. Montana and the United States err when they contend that Section A of the Compact both recognizes and "protects" pre-1950 rights. While that section recognizes those rights, protection occurs through the percentage allocation mechanism of Sections B and C, under which Montana makes no claim.

D. The Compact does not Cover Groundwater

The Compact in general, and Article V in particular, expressly covers only the diversion of surface water. Montana cites no indication in any of the voluminous minutes of the Yellowstone River Compact Commission meetings that the commissioners intended the Compact to cover groundwater. Presumably, if Montana had found any expressions of such intent, it would have mentioned it in its brief.

Instead, Montana argues that this Court should ignore the Compact's resounding silence about groundwater for two reasons. First, Montana contends that such silence is unimportant because this Court found in other interstate compact cases involving "depletion" compacts that groundwater was included. Mont. Br. at 51-53. Although the United States does not support Montana's contention that

the Compact restricts "depletions" by an upstream state and therefore covers groundwater, it argues that the Compact covers groundwater because groundwater pumping is a "diversion" from the rivers. U.S. Br. at 19, 23-26.

Montana's second argument in support of groundwater coverage is that in the absence of such coverage it would lack any recourse if Wyoming were to "dry up" the Tongue and Powder Rivers through groundwater withdrawals. Mont. Br. at 54. All of these arguments are unpersuasive.

1. The Court should not Rely on other Compacts to Determine if the Yellowstone River Compact Covers Groundwater

Wyoming agrees with Montana, the United States, Anadarko Petroleum Corporation, and with this Court's decisions, that the Republican and Arkansas River Compacts expressly cover all man-induced depletions in state line flows, and therefore include depletions traceable to groundwater withdrawals. *See* Anadarko Petroleum *Amicus* Brief ("Anadarko Br.") at 10-13; Mont. Br. at 50-53; U.S. Br. at 27-28; *Kansas v. Colorado*, 543 U.S. 86, 91 (2004); *Kansas v. Nebraska and Colorado*, 530 U.S. 1272 (2002). However, no part of the Yellowstone River Compact is based on the depletion theories that the Kansas, Colorado, and Nebraska drafters chose for their compacts. *See* Richard A. Simms, Leland E.

Rolfs & Brent E. Spronk, *Interstate Compacts and Equitable Apportionment*, 34 ROCKY MTN. MIN. LAW FOUND. INST. § 23.02[2] (1988); JEROME C. MUYS, INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL INTERSTATE COMPACT 11-12 & n.19 (National Water Comm'n 1971); Floyd A. Bishop, *Interstate Water Compacts and Mineral Development* (Administrative Aspects), 21 ROCKY MTN. MIN. LAW INST. 801, 802 (1975) (identifying Republican and Arkansas as depletion compacts and identifying YRC as divertible flow compact).

The Pecos River Compact, on which Montana also relies, is another classic depletion compact that covers surface and groundwater sources of the Pecos in New Mexico. It states in part: "New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." *Texas v. New Mexico*, 482 U.S. 124, 126 (1987), *quoting* Pecos River Compact art. III(a), 63 Stat. 159 (1949). Nothing approaching this language appears in the Yellowstone River Compact.

Not only did Montana, Wyoming, and North Dakota choose not to insert depletion provisions in the Yellowstone River Compact, they actually confirmed that choice by considering depletion provisions drafted by Engineering Committee Chairman Myers and affirmatively rejecting them. Wyo. App. 62-63. When Commission Chairman Newell reported to Congress that the commission had taken the

significant step of rejecting the depletion method in favor of the modified divertible flow method, he referred Congress to another compact that Wyoming had recently concluded, the Upper Colorado River Compact. Wyo. App. at 84. He noted that, although Wyoming had agreed to the depletion approach in that compact, it chose the divertible flow approach for the Yellowstone River Compact.

This Court has recently refused an invitation to discern the intent of compact drafters based on compacts between unrelated states involving different circumstances, even when those compacts contained similar language to the compact at issue. *New Jersey v. Delaware*, 128 S. Ct. 1410, 1424-25 (2008). So too, the Republican, Arkansas, and Pecos River Compacts negotiated by Kansas, Nebraska, Colorado, New Mexico, and Texas do not help to discern the intent of the Yellowstone River Compact's drafters, especially since no common language is used. *Id.*

By contrast, this Court held in *New Jersey v. Delaware* that an earlier compact between New Jersey and New York *did* help interpret New Jersey's intent in its later compact negotiations with Delaware. *Id.* at 1423-24. There, New Jersey used specific language in its New York compact that it failed to include in its later compact with Delaware. New Jersey then argued to this Court that its compact with Delaware should be interpreted to follow the concept embedded in that missing language. This Court disagreed, explaining that New Jersey could not expect an implied interpretation consistent with

language it had used in an earlier compact, when it could have simply used that very same language to make its intent plain in the later compact. *Id.*

That same logic applies here to the drafters' choice of language for the Yellowstone River Compact. Wyoming had used depletion language in its Upper Colorado River Compact shortly before the Yellowstone River Compact was negotiated. Upper Colorado River Compact, 63 Stat. 31; Wyo. App. at 61, 84. Yet it expressly rejected that concept and that language in the Yellowstone negotiations. Wyo. App. 61, 84. The Court should ask the same question in this case as it asked in *New Jersey v. Delaware* – if Wyoming wished to enter into a depletion or partial depletion compact with Montana (and thus a compact that covers all sources of water including groundwater) why did it fail to include depletion language that it knew intimately? Obviously, Wyoming did not include the language because it did not agree to the concept.

Montana's insistence on pounding a square peg from unrelated compacts into the round hole crafted by the drafters of the Yellowstone River Compact violates both the basic tenets of compact interpretation and explicit cautionary clauses contained in the very compacts to which Montana harkens. For example, the Republican River Compact states:

> The physical and other conditions peculiar to the Basin [of the Republican River] constitute the basis for this compact, and none of the States hereby, nor the Congress of the United States by its consent, concedes

> that this compact establishes any general principle or precedent with respect to any other interstate stream.

Republican River Compact art. I, 57 Stat. 86 (1943). *See also* Pecos River Compact art. XIII, 63 Stat. 159 (1949); Arkansas River Compact arts. II, VII B, 63 Stat. 145 (1949) (nearly identical language).

The drafters of the Republican, Arkansas, and Pecos River Compacts recognized the common sense notion that peculiar characteristics of those basins led to unique negotiated agreements, not form contracts. These compacts did not establish any precedent that should govern other interstate streams in those states, let alone the states of Wyoming, Montana, and North Dakota. *Id.*

The drafters of the Yellowstone River Compact similarly recognized that it was a bargained-for agreement based on unique history, geology, and geography. Article XIV of the Compact states:

> The physical and other conditions characteristic of the Yellowstone River and peculiar to the territory drained and served thereby and to the development thereof, have actuated the signatory States in the consummation of this Compact, and none of them, nor the United States of America by its consent and approval, concedes thereby the establishment of any general principle or precedent with respect to other interstate streams.

YRC art. XIV.

Relying on the other compacts to interpret this one would ignore the proscriptions of the drafters of those compacts, and the proscription against rewriting compacts to suit the Court's tastes rather than the drafters' intent. *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (Court's goal is to ascertain the intent of the drafters of a compact). The drafters of the Compact would likely be dismayed to learn that 58 years after they completed their lengthy negotiations, the depletion interpretation, and groundwater coverage based on that interpretation, was imported into the Compact based on compacts between other states, even though the drafters expressly rejected it by formal vote. It is remarkable that Montana asks this Court to ignore the Compact's negotiating history on the one hand, but on the other hand, asks it to rely on other states' compacts. Mont. Br. at 19-23, 49-54. If Montana had in 1950 wanted any of the various depletion compacts it now applauds, or any other basis for groundwater allocation, its delegation should have supported the Myers depletion draft that died when the commission adopted the divertible flow method. Wyo. App. at 62. It could also have sought to include specific groundwater provisions. It did not.

2. A Fairness Argument does not support Retroactive Insertion of Groundwater into the Compact

The second argument that Montana makes in favor of inserting groundwater coverage into the Compact is perceived fairness. Mont. Br. at 54. It

asserts that if this Court does not interpret the Compact to include groundwater pumping, Wyoming could with impunity dry up rivers through extraction of interconnected groundwater. *Id.* Even if this were so, parties are bound by contracts even if they subsequently perceive that they made a bad bargain. Moreover, Montana's premise that the Compact's exclusion of groundwater would leave it helpless fails.

A compact is a contract and a federal statute. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). It establishes rights and obligations of the parties with respect to the subjects it covers. Through explicit language, the Yellowstone River Compact comprehensively regulates surface water allocations except for a few express surface water exceptions. This preempts one of the parties from asserting claims for relief regarding surface water independent of the Compact, unless one of the exceptions applies. *English v. General Electric Co.*, 496 U.S. 72, 79 (1990), *citing Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Thus, Montana could not assert a claim to equitably apportion the "Yellowstone River System," a system of surface waters, outside of the bounds of the Compact, because the drafters and Congress preempted the field.

Montana could, on the other hand, seek equitable apportionment of groundwater assuming it could establish a viable claim. States may refuse to enter into any compact at all, and may simply rely on this Court to equitably apportion uncompacted interstate

waters if a controversy arises that motivates one state to bring suit.

During the course of the Yellowstone River Compact negotiations, several statutory deadlines expired when the drafters could not reach agreement, and this was perfectly permissible as an aspect of their freedom to contract. Even if states decide to enter into a compact, they are free to construct it as they see fit. In fact, states act sensibly when they do not allow negotiations to become bogged down on issues which they do not deem important. When the drafters finally did conclude the Compact, they excluded several surface water rights from its coverage – stock watering and domestic withdrawals, and rights to the Yellowstone River within Yellowstone National Park. YRC art. IV, § E; art. II, § D. As noted by the United States, the drafters also avoided the potentially complicated issue of reserved water rights for the Northern Cheyenne Reservation on the Tongue River and for the Crow Reservation on the Big Horn River. U.S. Br. at 6, *quoting* YRC art. VI.

Since the Compact's language is so clearly limited to surface waters, the drafters did not need to expressly exclude groundwater. Their express rejection of depletion approaches, together with their failure to reference groundwater, negates the inference that they incorporated groundwater by silence. Yet Montana and the United States contend that this Court should write groundwater coverage into the Compact.

The United States argues that various state courts developed common law theories before 1950 to resolve disputes involving groundwater withdrawals that could affect surface water flows – so-called interconnected or hydrologically connected groundwater. U.S. Br. at 26-27. While courts often have a duty to apply the common law to resolve disputes over water law issues that are not covered by statute, that is a very different charge than that faced by the drafters of the Compact. As freely contracting parties, Montana, Wyoming and North Dakota did not enter compact negotiations with an obligation to interpret the common law. They were free to do nothing at all, or to cover only particular issues at their discretion. The United States errs when it implies that the drafters must have intended to silently cover groundwater in the 1950 Compact simply because courts had been deciding groundwater issues for some time.

On the contrary, the existence of the common law background, together with geological realities, supported the drafters' decision not to even discuss the subject of groundwater during drafting sessions or commission meetings. In a 1940 study, the Bureau of Reclamation discovered that the Powder River Basin had minimal potential for irrigation from groundwater, which was not a surprise given the fine clay soils that give the Powder its name. Wyo. App. at 31-32. Ranchers had erected many small dams in the drainage to catch rainwater for livestock because of the poor potential for shallow groundwater. It is perilous

to assume, as do Montana and the United States, that the Compact Commission lacked good reason to select a divertible flow compact containing careful language that limited its coverage to surface flows.

Now, Montana contends that groundwater development has become a problem. But instead of asserting a claim to equitably apportion that resource between the states, it asks this Court to insert a depletion interpretation into this Compact so that groundwater is covered. Mont. Br. at 49-54. While the United States does not adopt Montana's depletion interpretation, it argues that the Compact covers hydrologically connected groundwater through its definition of the term "diversion." This argument fails on closer analysis.

Montana's groundwater allegations involve post-1950 development in Wyoming, which means that if the Compact covers groundwater, that groundwater would be allocated between the states under Sections B and C as post-1950 water. However, the Compact does not function with respect to post-1950 groundwater pumping because measurement of the equivalent contemporary stream diversion is not feasible. Surface water "diversions" can be measured at the moment the water leaves a stream through a headgate or pump, and that measurement can be immediately inserted into the divertible flow calculation under Section C. The tabulation of surface water diversions to ensure compliance with the Section B percentages *through a given date* in the water year, can be accomplished.

By contrast, groundwater pumping impacts the channel of a river, if at all, by either drawing water away from the river underground and diffusely, or by intercepting water that would otherwise percolate underground and diffusely into the stream channel. Laura Ziemer, Eloise Kendy, and John Wilson, *Ground Water Management in Montana: On the Road From Beleaguered Law to Science-Based Policy*, 27 PUB. LAND & RESOURCES L. REV. 75, 77 (2006). Although the instantaneous withdrawal from the well can be measured, the attenuated impact on surface flows cannot be readily measured. It cannot be assumed that water pumped from a well came immediately from the channel or would have made it to the channel that day, that year, or even that century. The timing depends on many variables.

The divertible flow allocation scheme of Sections B and C requires the authorities in both states to identify when water is diverted from the river channels. Water diverted on September 30 counts in one water year, while water diverted on October 1 counts in the next. If, as the United States argues, groundwater seepage is countable as a "diversion" under what it claims is a "capacious definition" in the Compact, the authorities would not know when interconnected water pumped from a well in the river basin was actually "taken or removed" from the river channel. Also, unless the authorities knew that water pumped from a well on a given date would have reached that channel in the absence of pumping on that very day, they could not include it in the running

calculation of divertible flow as of the "given date" under the United States' interpretation.

Interminable calculation problems would arise if this Court were to force groundwater into this Compact's allocation scheme designed for surface water. It is inconceivable that if the drafters intended the Compact to cover groundwater they would have overlooked in the text the many variables and assumptions that would be necessary to determine how much groundwater drawn from a well had seeped from the channel of the river, and when it had seeped from the channel.

The United States improperly stretches the drafters' definition of "diversion" beyond its practical intent of covering only the measurable taking or removing of surface water from the rivers and tributaries through headgates and pumps. Montana's legislature understood that diversions to post-1950 water rights to be measured under Section B of Article V were diversions of surface water. In 1953, the Montana legislature provided that its post-1950 appropriators that divert Yellowstone water through a "ditch" "or other means of diversion" must measure that water with a "weir," "or other measuring device." MONT. CODE ANN. § 85-20-105 (2005) (passed in 1953). Ditches remove surface water from rivers and tributaries, and weirs are surface water measuring devices. Under the concept of *ejusdem generis*, this Montana statute would not be broadly interpreted to cover groundwater well pumping and meters measuring such pumping. *Walter v. Bd. of R.R. Comm'rs*, 457

P.2d 479, 481-82 (Mont. 1969). The Montana legislature did not need to require its post-1950 appropriators to measure groundwater because the Compact does not cover groundwater.

The Compact's failure to cover groundwater does not prevent Montana from obtaining redress for harm it can prove Wyoming has caused through its groundwater activities. First, Montana can ask Wyoming to negotiate an amendment to the Compact to add the complicated groundwater provisions, assumptions and protocols that would be necessary to make the divertible flow scheme function for groundwater. Second, Montana can ask Wyoming to agree to a separate compact covering groundwater, which is not tied to the Compact's existing divertible flow concept. Finally, if Wyoming is unwilling to negotiate with Montana, Montana can bring an equitable apportionment case in this Court to apportion groundwater. However, Montana cannot properly invite this Court to expand the existing Compact to include groundwater.

CONCLUSION

Wyoming respectfully requests that the Court dismiss Montana's Bill of Complaint.

Respectfully submitted,

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May 2008

No. 137, Original

In The
Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING and
STATE OF NORTH DAKOTA,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

WYOMING'S REPLY TO MONTANA'S EXCEPTION

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Upper Colorado River Basin Compact, 63 Stat. 31 (1949).....23, 32

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WYO. STAT. ANN. § 41-12-601 24

OTHER AUTHORITIES

DAN ASHENBERG, A COOPERATIVE PLAN TO ADMINISTER THE YELLOWSTONE RIVER COMPACT, (Water Resources Division, Montana DNRC Draft Report Nov. 1983) 30

Floyd A. Bishop, *Interstate Water Compacts and Mineral Development (Administrative Aspects)*, 21 ROCKY MTN. MIN. L. INST. 801 (1975) 30

DAVID H. GETCHES, WATER LAW IN A NUTSHELL (4th ed. 2009) 38, 39, 40, 42

WELLS A. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST (U.S. Gov't Printing Office 1942) 36, 39

Henry Loble, *Interstate Water Compacts and Mineral Development (With Emphasis on the Yellowstone River Compact)*, 21 ROCKY MTN. MIN. L. INST. 24 (1976) 30

MONTANA DNRC, YELLOWSTONE RIVER COMPACT 32 (Nov. 29, 1989) 30

JEROME C. MUYS, INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL INTERSTATE COMPACT (National Water Comm'n 1971) 29

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JOSEPH L. SAX, BARTON H. THOMPSON, JR., JOHN D. LESHY AND ROBERT H. ABRAMS, LEGAL CONTROL OF WATER RESOURCES (Thompson/West 2006) 18, 35, 53

Richard A. Simms, Leland E. Rolfs & Brent E. Spronk, *Interstate Compacts and Equitable Apportionment*, 34 ROCKY MTN. MIN. L. INST. § 23.02[2] (1988) 29

A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES (2007) 13, 18, 20, 37

I. SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES (3d ed. 1911) 36, 39, 43

STATEMENT OF THE CASE

I. Background

The State of Montana ("Montana") takes exception to two legal conclusions in the Special Master's first interim report – (1) that under the doctrine of appropriation incorporated into Article V(A) of the Yellowstone River Compact ("the Compact")[1] Wyoming irrigators with pre-1950 water rights can increase the amount of water their crops consume by converting to sprinkler irrigation systems, even if the increase reduces return flows to downstream irrigators in Montana, FIR at 38-39, 64-65, 89, ¶ 3 ("the sprinkler irrigation issue"); and (2) that Wyoming appropriators with post-1950 water rights need not curtail their diversions when downstream pre-1950 Montana appropriators are unsatisfied from the same stream, "[w]here Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice its other rights under the Compact. . . . FIR at 25-28, 90 ¶ 8 ("the curtailment conditions issue"). The Special Master based both of these conclusions on legal argument rather than facts developed through

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[1] Throughout this brief, the State of Wyoming ("Wyoming") will cite to the Compact as Montana did in its Exceptions and Brief. Montana's Exceptions and Brief at 4, n.1 ("Mont. Exc."). The citations will be abbreviated "Compact at" followed by the page number of Appendix A to the First Interim Report. For consistency Wyoming will also employ Montana's abbreviation of the Special Master's First Interim Report, "FIR."

discovery, which has not yet begun. The parties stipulated to the reliability of many documents that shed light on the Compact negotiations, but such documents did not contain facts on technical aspects of conversions of flood irrigation systems to sprinkler systems. *See* FIR at 3 & n.1 (referring to Joint Appendix of the parties).

II. Prior Proceedings in this Case

Montana's summary of the proceedings in this case is generally accurate, but does not mention the opportunities the Special Master gave to the parties and *amici* to present all arguments they wished to make on every issue. Montana also fails to mention that it did not present arguments on the curtailment conditions issue to the Special Master when given such opportunities. Mont. Exc. at 5-6.

This Court referred this case to the Special Master for further proceedings after Wyoming's Motion to Dismiss was fully briefed. After oral hearing, the Special Master issued a memorandum opinion. (Mem. Op. (June 2, 2009).)[2] In that opinion,

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[2] The Special Master has posted on the Stanford Law School website (http://www.stanford.edu/dept/law/mvn) most of the pleadings that the parties have submitted to him to date, and the posting is indexed clearly. The Clerk of this Court has advised Wyoming that this Court will request from the Special Master any non-posted pleadings if necessary to review those parts of the record. References to pleadings in the remainder of this brief will not repeat the website address.

he exhaustively analyzed the parties' arguments and then recommended denial of Wyoming's motion on all of Montana's claims for relief. *Id.* However, he also announced the two legal conclusions on the sprinkler irrigation and curtailment conditions issues.

Shortly after issuing the memorandum opinion, the Special Master held a status conference, during which he invited the parties, the United States and *amici* to file "letter briefs" seeking correction or clarification of various components of the memorandum opinion. (*See* Case Management Order No. 2 (June 12, 2009).) He also invited briefing on "[a]ny other issues regarding Wyoming's Motion to Dismiss that either Party believes should be addressed in the First Report to the Supreme Court and that are not fully addressed in the Memorandum Opinion." *Id.* Montana filed a lengthy brief that focused entirely on the Special Master's recommendation on the sprinkler irrigation issue, but offered no argument on the curtailment conditions issue. (Mont. Ltr. Brf. (July 17, 2009).)

In their respective responses to Montana's letter brief, Wyoming and the United States took issue with Montana's additional arguments and authorities on the sprinkler irrigation issue. (Wyo. Rsp. to Mont. Ltr. Brf. at 4-6 (Aug. 3, 2009); Ltr. Br. of U.S. at 2-4 (July 24, 2009).) Neither the United States nor Wyoming responded to the curtailment conditions issue since Montana had not raised it in its letter brief. *Id. passim.*

On September 4, 2009, the Special Master issued a 31-page supplemental opinion on Wyoming's motion to dismiss. (Supp. Op. (Sept. 4, 2009).) He devoted 28 pages to Montana's sprinkler irrigation arguments and several pages to clarifications that Wyoming had suggested in its letter brief, but he wrote nothing about the curtailment conditions he had described in his memorandum opinion, since Montana had failed to take issue with it in its letter brief. *Id.* at 3.

After briefing and argument on motions other than the motion to dismiss, the Special Master compiled a draft interim report incorporating his analysis from both his memorandum opinion and his supplemental opinion. Before submitting the final report to this Court, he asked the parties to suggest corrections to the draft. (Elec. Mail from Sp. Master's Asst. Susan Carter to all counsel (Jan. 5, 2010).) This gave Montana yet another opportunity to question the Special Master's decision on the curtailment condition issue, but Montana did not do so. (Ltr. from John Draper to Sp. Master (January 12, 2010).)

The Special Master ultimately submitted his First Interim Report to this Court on February 10, 2010. That report contained extensive analysis of the sprinkler irrigation issue drawn from both the memorandum opinion and supplemental opinion. FIR at 54-88, but lacked analysis of the curtailment conditions issue beyond what the Special Master had included in his memorandum opinion. FIR at 27-28.

SUMMARY OF ARGUMENT

Montana first takes exception to the Special Master's basic premise that Section V(A) incorporates the law of appropriation, and instead proposes that Section V(A) establishes a quantitative limit on consumptive use in Wyoming based on the amount of water that was consumed by crops in 1950. Essentially, Montana attempts to convert Section V(A) from a clause that incorporates the doctrine of appropriation into a consumption clause found in other compacts between other states. In doing so, Montana reads much of Section V(A) out of existence.

Section V(A) does not state any amount for Wyoming's alleged consumption limitation, and lacks any methodology to calculate such an amount. As defined in the Compact, the phrase "beneficial uses" simply establishes the *types* of water uses sanctioned as beneficial and protectable by the Compact, and is not an operative provision limiting any amount of consumptive water use. The Special Master, like numerous commentators before him, correctly found that the Compact does not contain any consumptive use limitations in Section V(A) or anywhere else. He therefore correctly recommended to this Court that Section V(A) incorporates the doctrine of appropriation, and under that doctrine, Wyoming irrigators with pre-1950 water rights may increase water consumption by their crops by adopting sprinkler irrigation technology without creating any Wyoming liability under the Compact.

As to Montana's second exception, Montana had two opportunities after the Special Master first recognized the curtailment conditions in his memorandum opinion to argue against them, but failed to do so. Thus, Montana waived its right to raise the issue for the first time on exception.

Montana's waiver of the curtailment conditions issue notwithstanding, the Special Master correctly found that the doctrine of appropriation requires Montana pre-1950 irrigators to satisfy their water requirements in times of low water from other Montana resources before obtaining curtailment of post-1950 Wyoming water rights, unless to do so would violate Montana's rights under the Compact. Without this balanced curtailment condition that protects post-1950 rights in Wyoming from unnecessary calls for curtailment from Montana, Montana could use the doctrine of appropriation incorporated in Section V(A) as a sword to interfere with Wyoming's rights under Section V(B) of the Compact to divert a minimum percentage of available water to its post-1950 water rights. The Special Master's curtailment conditions simply harmonized the operation of Sections V(A) and V(B).

The Court should overrule both of Montana's exceptions.

ARGUMENT

I. The Special Master Correctly Concluded that under the Doctrine of Appropriation Incorporated in Article V(A), Wyoming may Allow its Pre-1950 Appropriators to Increase Crop Consumption through Improved Irrigation Techniques without Compact Liability for any Reduced Return Flows

A. Standard of Review

The Special Master and Montana have both accurately stated the applicable standard of review for a motion to dismiss. FIR at 15-16; Mont. Exc. at 12-13. However, this Court takes a somewhat more expansive view of a motion *in the nature of* a motion to dismiss in an original action before this Court. In reviewing such a motion, the Court considers reliable documents in addition to the pleadings themselves. *New Hampshire v. Maine*, 532 U.S. 742 (2001); *United States v. Louisiana*, 363 U.S. 1, 12-13 (1960); *Arizona v. California*, 292 U.S. 341, 359-60, (1934). By moving the review of some documents forward from the post-discovery stage of proceedings to the motion to dismiss stage, the Court advances its goal of reaching the merits as soon as possible in original actions. *See Ohio v. Kentucky*, 410 U.S. 641, 644 (1973).

B. Introduction to the Compact's Overall Structure

Wyoming's motion to dismiss hinged on the meaning of Section V(A) of the Compact, so the arguments on Montana's exceptions must ultimately focus on that section. How Section V(A) fits within the overall structure of Article V is an important indicator of what the drafters intended Section V(A) to accomplish. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995) (contract should be read to render all provisions consistent).

The drafting history of the Compact provides important evidence of the overall structure of Article V. *See* FIR at 30-37 (Special Master's detailed discussion of how drafters constructed Article V during negotiations). This history confirms that the drafters chose a tiered approach, under which: (1) a divertible flow methodology as described in Sections (B) and (C) governed the allocation of water to post-1950 diversions in each state; and (2) a doctrine of appropriation governed how pre-1950 rights in Montana would interact with Wyoming water rights.

During the second round of 1950 negotiations that led to the Compact, the drafters formally accepted the divertible flow methodology as a starting point. (Joint App. at 152 (meeting of Oct. 24, 1950).) This was the same general methodology that the two prior negotiating commissions had chosen for the 1942 and 1944 draft versions of the Compact that

had ultimately failed, but in 1950 the drafters made important modifications to the methodology.

The 1942 and 1944 commissions had chosen divertible flow methodologies in which the divertible flow available in each of the four interstate tributaries flowing from Wyoming into Montana would be allocated to each state by percentages. FIR at 7-8. Those commissions carefully defined the divertible flow of a river as the amount of water the irrigators and other users actually diverted from the river at their headgates on a particular day, net daily gains or losses in reservoir storage, plus the amount of water passing a stream gauge at the mouth of the river in Montana on that day. (Joint App. at 242, 258.) Each state was allowed a percentage of that daily flow, with the calculation resetting at the end of each day. *Id.* at 244-246, 261-264.

The 1942 and 1944 compacts applied this daily divertible flow formula to existing water rights that were recognized in each state as of the compacting date. They specified daily numeric mass quantity limits to which the formula would be applied in order to divide the daily flows among pre-1950 rights. *Id.* Any water remaining above these daily numeric quantities would be available for diversion to new water rights that might be established after the compacting date. *Id.* Because under the 1942 and 1944 versions, pre-compact water rights were to be regulated under the divertible flow methodology, those versions did not need to establish any other

methodology for the treatment of such pre-compact water rights.

The 1950 drafters retained the divertible flow method, but instead of applying this method to the allocation of water between pre-1950 water rights in the two states, the drafters altered the treatment of the pre-1950 and post-1950 tiers, and in Section V(B) imposed the percentage divertible flow allocation method only upon water diverted to post-1950 water rights. Compact at A-7 through A-8. The 1950 version also altered the divertible flow method from a daily method to an annual cumulative method, imposing in Article V(C) an explicit means of calculating the cumulative divertible flow to which percentage allocations would apply on any given date in the water year running from October 1 through September 30. *Id.* at A-8 through A-9.

Having chosen to apply the cumulative divertible flow method only upon post-1950 water rights, the 1950 drafters had to decide how water diverted to existing pre-1950 water rights would be handled, a task that had been unnecessary in 1942 and 1944. They provided for pre-1950 rights in Section V(A) of the Compact, by stating the such "appropriative rights" "existing in each signatory state as of January 1, 1950" "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Compact at A-7.

It is clear from the drafters' official minutes that they did not intend the doctrine of appropriation they imposed on pre-1950 water rights to allow a Montana diverter with an unsatisfied *pre-1950* water right to force curtailment of Wyoming irrigators who might be diverting under *pre-1950* water rights, even if those Wyoming rights were chronologically junior to the unsatisfied Montana right. (Joint App. at 71); FIR at 32-33, 56-57. Montana conceded this point at the outset of this case in its brief in support of its motion to file a bill of Complaint. (Mot. for Leave to File Bill of Compl. at 19 (January 2007).) Therefore, the question posed in Wyoming's motion to dismiss focused only on whether Montana irrigators with unsatisfied pre-1950 rights could force curtailment of Wyoming *post-1950* appropriative rights under the "doctrine of appropriation" incorporated by Article V(A).

In summary, the history of Compact negotiations demonstrates that the drafters intended Article V to create a tiered structure, separating the treatment of existing water rights as of 1950 from the treatment of water rights that would be created by new diversions and storage projects in each state after 1950. The post-1950 rights were subjected to the cumulative divertible flow methodology of Sections (B) and (C) of Article V, while pre-1950 water rights were governed by a "doctrine of appropriation" in Section V(A).

C. The Special Master's Reading of Section V(A) of the Compact

Section V(A) of the Compact consists of one sentence, straightforward in structure, and for the most part, easily understood:

> Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Compact at A-7.

The Special Master, the United States, and Wyoming have agreed that the subject of the sentence is "appropriative rights . . . existing in each signatory State as of January 1, 1950" – in other words, water rights established under the prior appropriation systems of Montana and Wyoming with priority dates from territorial rights through January 1, 1950. (Wyo. Reply Br. at 4-8 (May 2008); Br. for U.S. at 10 (May 2008)); FIR at 16-17.

This subject, "appropriative rights," is modified by the additional clause "to the beneficial uses of the water of the Yellowstone River System." Thus, Section V(A) only protects pre-1950 water rights in Montana or Wyoming that had been established for purposes that the Compact defined as beneficial – uses that have the effect of consuming some of the water diverted "when usefully employed by the activities of

man." Compact at A-4, Art. II(H). As the Special Master correctly concluded, the Compact's definition of "beneficial use" is unremarkable, mirroring the types of uses that state governments in the western United States in the middle of the last century would recognize as sufficiently beneficial to society to merit protection against junior appropriators under the prior appropriation doctrine. FIR at 59-61; *see also* A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:30 (2007); Wyo. Stat. Ann. § 41-3-101 (2007); Mont. Code Ann. § 85-2-101 (2005).

The other part of the clause modifying the subject "appropriative rights" in Section V(A) is also unremarkable. The appropriative rights protected under that section are only rights to waters of the Yellowstone River System, which by Compact definition would include rights to divert water from the Tongue and Powder Rivers and their tributaries. Compact at A-3, Art. II(D).

The remainder of Section V(A) includes a verb phrase in which the drafters stated *what* would happen to pre-1950 appropriative rights when the Compact became law – such rights "shall continue to be enjoyed." The section then concludes by telling *how* the rights should "continue to be enjoyed" – "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." It is this last clause that created the central debate in Wyoming's motion to dismiss.

Wyoming contended that the drafters intended the cumulative divertible flow methodology of Sections V(B) and V(C) to be the sole means of dividing the waters of the rivers. (Wyo. Mot. to Dismiss at 36-37 (April 2008).) Wyoming argued that the drafters intended Section V(A) to recognize the continued validity of existing pre-1950 water rights in each state, but only to be administered in each state under each state's own doctrine of appropriation. *Id.* at 42-43. Wyoming's reasoning for this intrastate application of Section V(A) need not be repeated here. *Id.* at 39-50; (Wyo. Reply Brf. on Mot. to Dismiss at 11-16 (May 2008).)

The United States contested Wyoming's position, arguing that pre-1950 Montana rights enjoyed the protection of a general, interstate "doctrine of appropriation" that the drafters incorporated in Article V(A). (Br. of U.S. at 10-21 (May 2008).) The Special Master ultimately agreed with the United States. FIR at 37, 41, 42.[3]

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[3] Although the Special Master found that the drafters intended "the doctrine of appropriation" to be a general term, not necessarily the law of either state, he also found that the laws of appropriation in Montana and Wyoming could help inform his determination of what the general doctrine entailed. FIR at 66-67, 78-85. Throughout his first interim report, he thoroughly reviewed the laws of each state, especially on the issue of whether the doctrine of appropriation would allow irrigators to increase the amount of water their crops consumed, possibly reducing return flows to a river. *Id.* His review of state law as an interpretive tool did not create a conflict between state

(Continued on following page)

Once the Special Master determined this central issue, his analysis of Montana's four claims became clear – he had to decide if each of Montana's claims alleged Wyoming acts that could result in violations of the "doctrine of appropriation" when such acts affected stream flows available to pre-1950 Montana water rights on any particular day. He decided that Montana's bill of complaint was broad enough to state three valid claims for relief because Montana alleged that its water users with pre-1950 rights had been denied water in times of scarcity because of contemporaneous diversions to post-1950 rights in Wyoming. FIR at 40-42, 52-53. Whether this might have occurred because Wyoming had allowed such competing post-1950 Wyoming diversions to be made into reservoirs, into canals or pipes serving post-1950 rights, or from post-1950 groundwater wells hydrologically connected to the river in question, the Special Master found it to be a potential violation just the same. *Id.*

Besides alleging that Wyoming diversions to *post-1950* rights might harm pre-1950 rights in Montana, Montana also alleged that Wyoming had violated or threatened to violate Section V(A) by allowing irrigators who diverted water to their land under

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law and the Compact. This Court's holding in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), that state water users may not undercut compact administration based on their state law rights is irrelevant. Mont. Exc. at 13-16, 33.

pre-1950 rights to increase the water consumption by their crops, thereby reducing return flows to the rivers flowing into Montana. (Bill of Complaint ¶ 12.) The Special Master applied his reading of Section V(A) to this sprinkler irrigation claim just as he had applied it to the other claims. He simply considered how this claim would fare under a general doctrine of appropriation. His exhaustive inquiry led him to conclude that Wyoming pre-1950 irrigators could increase water consumption through efficiency improvements. (Mem. Op. at 37-41; Supp. Op. at 3-28.)

In summary, the Special Master agreed with Wyoming and the United States that Section V(A) incorporated a doctrine of appropriation. He further decided that this doctrine had interstate application to protect Montana pre-1950 rights from Wyoming post-1950 diversions. In the end, however, that doctrine did not protect Montana pre-1950 rights from changes in consumptive use by pre-1950 Wyoming rights. To reach this last conclusion, he applied the text of Section V(A) logically to the sprinkler irrigation issue.

D. Montana's Construction of Section V(A) is Incorrect

Montana's exception to the Special Master's decision on the sprinkler irrigation issue goes to the basic premise of the Special Master's reading of Section V(A). Montana argues that Section V(A) does not incorporate a doctrine of appropriation to protect

Montana and Wyoming pre-1950 appropriative rights, but instead, establishes a quantitative limit on the total amount of water that may be consumed by crops in Wyoming fields irrigated under pre-1950 rights. Mont. Exc. at 11, 18-19. This reading of Section V(A) fails because it would: (1) change the fundamental structure of Section V(A); (2) create an amorphous quantitative limit on consumptive use of water somehow derived from the definition of "beneficial use," when the drafters could have done so simply and directly had they intended Montana's interpretation; (3) insert a depletive or consumptive use compact methodology into the Compact although the drafters expressly rejected that methodology; and (4) contradict the commentators who have unanimously stated that the Yellowstone River Compact is a divertible flow compact, not a consumptive use compact.

1. Montana's Reading of Section V(A) Changes the Fundamental Structure of the Section

In order to convert Section V(A) into a quantitative limit on consumption, Montana first changes the subject of the section from "appropriative rights," to the phrase "beneficial uses." Mont. Exc. at 11, 18-19. Montana's argument requires this substitution, because it is axiomatic under western water law that an "appropriative right" is usufructuary, and not an ownership right in water itself. *Mettler v. Ames Realty*

Co., 201 P. 702, 704 (Mont. 1921); *Mitchell Irrigation Dist. v. Sharp*, 121 F.2d 964, 967 (10th Cir. 1941).

A usufructuary right creates only a claim under which an appropriator can divert water from a stream if and when water is available to satisfy the right. A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:39 (Thomson/West 2007). The delivery of water in time of shortage to satisfy the downstream usufructuary right depends on whether upstream appropriators have a right to water that is superior or inferior. JOSEPH L. SAX, BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES 125-26 (Thomson/West 2006). Conversely, the right of the upstream appropriator is also based on the manner in which the doctrine of appropriation prioritizes that right.

Therefore, when Article V(A) identifies the subject of its coverage as "appropriative rights," it does not imply any hard and fast amount of water to which those rights will be either entitled or limited. Rather, it merely provides that the pre-1950 rights in Montana and Wyoming will interact as dictated by the various rules of the doctrine of appropriation. Montana's argument for a hard and fast quantitative limit on pre-1950 rights in Wyoming fails if the subject of Article V(A) is "appropriative rights . . . existing in each signatory State as of January 1, 1950." *See* FIR at 60 (Special Master's discussion of distinction between an appropriative right and a guaranty of quantity).

The drafters reinforced the appropriative rights methodology of Section V(A) by making "appropriative rights" the subject of the sentence, and by stating in the final clause that pre-1950 appropriative rights shall continue to be enjoyed "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." In his 1951 report to the United States Senate recommending enactment of the Compact, Secretary of Interior Oscar Chapman correctly summarized Section V(A) by giving voice to the subject of the section, "appropriative rights," and to the final clause that incorporates the "doctrine of appropriation:"

> Accordingly, paragraph A of article V recognizes the appropriative rights to the beneficial uses of the water of the Yellowstone River system existing in each signatory State as of January 1, 1950, and it permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

(Joint App. at 22.) Thus, the subject of the sentence comprising Article V(A) is "appropriative rights," and the enjoyment of those pre-1950 appropriative rights occurs under a "doctrine of appropriation."

Even after excising "appropriative rights" as the true subject of Section V(A), Montana's analysis requires more tortured reasoning to arrive at its consumptive limit interpretation. Montana could not eliminate "appropriative rights" as the subject of the

sentence without offering a substitute. Montana chooses "beneficial uses" as this substitute. Montana then contends that the drafter's definition of "beneficial use" would effectively establish a fixed consumptive limit on pre-1950 Wyoming water rights. Mont. Exc. at 18-19.

The Compact defines "beneficial use" as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Compact at A-4, Art. II(H). Montana argues that because this definition contains a form of the word "depletion," Section V(A) must employ the phrase "beneficial uses" to place a quantitative limit on water depleted by crops. Mont. Exc. at 26. The Special Master correctly rejected this analysis. FIR at 61.

Nowhere in the definition of "beneficial use" did the drafters state that it means a quantity of water depleted. Rather, they define it as a use "*by which*" the water supply of a drainage basin is depleted. Compact at A-4 (emphasis added). The drafter's definition simply recognized the principle of appropriative rights doctrine that only water applied for beneficial purposes or "uses" should be given state-sanctioned status. FIR at 61; TARLOCK, *supra* at §§ 5:30, 5:66; WYO. STAT. ANN. § 41-3-101 (2009); MONT. CODE ANN. § 85-2-102 (2005).

The traditional core list of beneficial purposes or uses includes irrigation, municipal, industrial, domestic and stock watering activities. TARLOCK,

supra at § 5:66. By only providing Section V(A) protection to "appropriative rights" for purposes that had some depletive effect, the drafters of the Compact, like most of their western state contemporaries, withheld Compact protection for any water rights that either state had, or would in the future create, for non-depletive uses, such as instream flows. For example, Wyoming did not recognize non-depletive instream flows as protectable beneficial uses of water until 1986, and its 1950 compact commissioners would surely have resisted any definition inconsistent with Wyoming law. WYO. STAT. ANN. §§ 41-3-1001 through -1014. The Special Master was correct when he decided that the definition of "beneficial use" simply established the *purposes* of water rights protected by the Compact, not an *amount* of water to be allocated under Section V(A). FIR at 59-61.

In misinterpreting the function that the phrase "beneficial uses" serves in Section V(A), Montana ignores the fact that the phrase appears not only in Section V(A), but also in Section V(B), which states in pertinent part, "the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows." Section V(B) then proceeds to set percentage divertible flow limits to which each state is entitled for post-1950 rights, and is followed by Section V(C), which specifically states how the states are to quantify the cumulative divertible flows.

If the term "beneficial use" means what Montana claims – a volumetric cap on depletions – one must ask what it is doing in Section V(B), which has its own careful method of quantifying volumes based on the divertible flow concept. (*See* Joint App. at 18.) By contrast, the construction of "beneficial use" accepted by Wyoming, the United States and the Special Master makes sense within both Section V(A) and Section V(B). In Section V(B), this construction makes clear that only diversions for uses that are beneficial are counted for purposes of the post-1950 percentage allocations. Section V(A) makes clear that pre-1950 appropriative rights in each state only receive protection under the doctrine of appropriation when the water diverted under those rights is used for beneficial purposes. The appearance of the phrase "beneficial uses" in Section V(A) does not advance Montana's argument that the section creates a volumetric limit on pre-1950 water consumption in Wyoming.

2. If the Drafters had Intended to Make Article V(A) into a Consumptive Use Limit they would have done so with Simple and Practical Words

It is telling that Section V(A) lacks any simple or straightforward language that would create a volumetric limit on water consumption by Wyoming pre-1950 water rights. Montana fails to explain where in Article V(A) or in the definition of "beneficial use" water administrators or courts might find

sufficient details of its consumptive limit to make it functional. Other interstate compacts that impose such limits contain express provisions that state the amount or percentage that an upstream state may consume and also state over what time period volumes of water are to be summed so the consumptive limit can be calculated. Republican River Basin Compact art. III, 57 Stat. 86 (1943); Arkansas River Compact art. IV, 63 Stat. 145 (1949).

For example, the Upper Colorado River Basin Compact, which Wyoming negotiated in the 1940s, and which the drafters of the Yellowstone River Compact considered but rejected as a template, expressly allocates a fixed amount of water for "consumptive use" by the State of Arizona, and then allocates by percentages for consumptive use in Colorado, New Mexico, Utah and Wyoming, the water not otherwise dedicated to California, Arizona and Nevada under the Colorado River Basin Compact. Upper Colorado River Basin Compact art. III, 63 Stat. 31 (1949). It expressly provides that the apportionment is made "per annum," and states when the 12 month "water year" ends – September 30. *Id.* & art. II(a)(xi). It also defines how consumptive use is counted – by the "inflow-outflow method," based on the virgin flow at the point where the Colorado River exits the upper division states. *Id.* art. VI.

While the Upper Colorado River Basin Compact is not foolproof, it certainly demonstrates the basic parameters that drafters would include in a compact following the consumptive use methodology.

Wyoming's State Engineer L.C. Bishop acted as Wyoming's lead commissioner in the negotiation of the Upper Colorado River Basin Compact, the Snake River Compact, and the Yellowstone River Compact. WYO. STAT. ANN. §§ 41-12-401, 41-12-501, 41-12-601 (2007). Mr. Bishop and the other drafters of the Yellowstone River Compact were well aware of the alternative compacting methods available to them. (*See* Joint App. at 57, 61.) Yet, even though Wyoming negotiated the Upper Colorado River Basin Compact at the same time as the Yellowstone River Compact, Montana would have the Court believe that Wyoming accepted a consumptive use limit with none of the basic formulas that would allow implementation.

Montana attempts to overcome Article V(A)'s lack of specific consumption limits by contending that the phrase "existing in each signatory State as of January 1, 1950" creates a method to calculate such a limit. However, if the drafters intended to set a consumption limit based on the entire year of 1949, they would have stated when that water year began and ended. If they intended a limit based on average consumption over a number of water years preceding 1950, they would have said so. The same drafters who carefully crafted the formulas for post-1950 divertible flow allocation in Section V(B) would not have overlooked the need for such basic provisions in Section V(A) if they intended a consumptive use limit.

Montana also attempts to overcome the lack of language creating a consumptive use limit in Section V(A) by analogizing to the Republican River Basin

Compact. Montana contends that the definition of "beneficial use" in the Compact must create a consumptive use limit in Section V(A) because a similar definition of "beneficial consumptive use" is found in the Republican River Basin Compact, and that compact has been held to create consumptive use limits. Mont. Exc. at 15 & n.3, *citing Kansas v. Nebraska*, 530 U.S. 1272 (2000).

In making this argument, Montana confuses correlation with cause. The Republican River Basin Compact does define its term "beneficial consumptive use," similarly to the Yellowstone River Compact's definition of "beneficial use." However, while the Republican River Basin Compact may have been held to place a limit on consumption in an upstream state, its methodology does not arise from the definition of "beneficial consumptive use." Instead its methodology arises from the operative provisions of that compact. It expressly creates consumptive use limits measured in acre-feet of water: 54,100 acre-feet "allocated for beneficial consumptive use in Colorado, annually;" 190,300 acre-feet "allocated for beneficial consumptive use in Kansas, annually;" and 234,500 acre-feet "allocated for beneficial consumptive use in Nebraska, annually." Republican River Compact art. IV, 57 Stat. 86 (1943).

The Yellowstone River Compact contains no such language in Section V(A) either creating an amount of a consumptive use limit or a time frame over which such amount should be measured. Montana's reference to the Republican River Basin Compact actually

undermines its argument by showing what a compact truly limiting consumption by annual volume would look like. *See New Jersey v. Delaware*, 552 U.S. 597, 615-18 (2008) (*quoting Rocca v. Thompson*, 223 U.S. 317, 332 (1912)) ("Interstate compacts, like treaties, are presumed to be 'the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties.'").

In summary, Section V(A) of the Yellowstone River Compact lacks language supporting Montana's theory of a consumption limit on pre-1950 rights, despite Montana's suggestion that the definition of "beneficial use" could be so applied.

3. Montana's Interpretation would Create a Consumptive Use Compact, a Methodology the Drafters Expressly Rejected

Montana's contention that Section V(A) creates a consumption limit contradicts clear negotiating history. Engineering Committee Chairman Myers proposed the depletion/consumptive use principle at the August 1950 joint meeting of the commission's engineering and drafting committees. (Joint App. at 228.) He stated that the simplest kind of compact, which was most practical and easy to administer, would be a compact that puts "a ceiling on the depletion to take place upstream[.]" *Id.* Mr. Myers

drafted such a compact and circulated it to the engineering committee on September 27, 1950. (Joint App. at 196.) He incorporated the depletion concept in Article V of his draft through his use of the phrases "consumptive use," "depletions," and "inflow-outflow method" as follows:

> A. There is hereby apportioned from the Yellowstone River System . . . the consumptive use per annum of water, as follows:
>
> [blanks for percentage allocations to Montana and Wyoming on the four interstate tributaries]
>
> . . . .
>
> C. The consumptive use of water, which use is apportioned in paragraph A hereof, shall be determined for each State by the inflow-outflow method in terms of man made depletions in addition to existing depletions as of January 1, 1951.

(Joint App. at 206-07.)

The engineering committee recommended rejection of the Myers depletion draft in a letter to Commission Chairman Newell. (Joint App. at 232.) At its October 1950 meeting, the full commission considered the concept but rejected it by formal vote. *Id.* at 61. In his 1951 report to Congress accompanying the final Compact, Chairman Newell emphasized the commission's choice of divertible flow over depletion:

> In determining the amount of water subject to the allocation, the "divertible flow" principle was chosen over the "depletion" principle, because the former had been used in earlier negotiations and was more familiar to the commissioners, who were assured by the consultants that the latter had no outstanding advantages even though it had been selected on the upper Colorado.

Id. at 18.

Not surprisingly, the final Compact nowhere uses the words "consume," "consumption," or "consumptive," and only uses the term "depleted" (or its derivatives) once, in the definition of "beneficial use," which as explained above, refers to types of uses rather than amounts.

Unable to garner support for its depletion interpretation of Section V(A) from the drafters' actual negotiations, votes, or reports to Congress, Montana ventures far afield in search of something to suggest that the drafters intended that result. Montana argues that because the Compact Commission's Engineering Committee undertook reconnaissance studies during the compacting process to determine how much water was diverted and consumed in Wyoming and Montana, the drafters must have used the facts so gathered to select a consumptive limit under Section V(A). Mont. Exc. at 29. However, the fact that such due diligence occurred does not imply how the drafters would have used the results. The results might have convinced them to

either accept a methodology or reject it. The drafters rejected the depletion concept by formal vote, and instead adopted a doctrine of appropriation in Section V(A) with plain words. What they studied to get there does not contradict the result.

4. Commentators have Unanimously Identified the Yellowstone River Compact as a Divertible Flow Compact

Throughout its exception, Montana refers to other compacts, drafted by other commissions, and apportioning other rivers. While these compacts legitimately may create annual quantitative consumption or depletion limits on upstream states in their operative clauses, these clauses contain no language remotely similar to the single sentence that comprises Section V(A) of the Yellowstone River Compact. Over the six decades since the Compact's enactment, many commentators have expressly stated that the Yellowstone River Compact is not based on the depletion principle of the other compacts, and that the Compact's only mass allocation of water is its divertible flow allocation between post-1950 rights created in Section V(B).[1] One commentator explained succinctly:

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[1] *See* Richard A. Simms, Leland E. Rolfs & Brent E. Spronk, *Interstate Compacts and Equitable Apportionment*, 34 ROCKY MTN. MIN. L. INST. § 23.02[2] (1988); JEROME C. MUYS,

(Continued on following page)

> The Compact affirms and recognizes appropriative rights to the beneficial use of water of the Yellowstone River system existing in all three states as of January 1, 1950, plus supplemental water supplies. . . . *The doctrine of appropriation is recognized* and the remainder of the unused and unappropriated water is allocated to each state for storage or direct diversions by apportionment on a percentage basis of the waters of the interstate tributaries of the Yellowstone River. . . .

Henry Loble, *Interstate Water Compacts and Mineral Development (With Emphasis on the Yellowstone River*

INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL INTERSTATE COMPACT (National Water Comm'n 1971); Floyd A. Bishop, *Interstate Water Compacts and Mineral Development (Administrative Aspects)*, 21 ROCKY MTN. MIN. L. INST. 801, 802 (1975); App. A to Wyoming's Brief in Opposition to Motion for Leave to File Bill of Complaint at A-5 (Letter and white paper from Orrin Ferris, Administrator of the Water Resources Division of the Montana DNRC to Wyoming State Engineer (1976) ("The compact is explicit in allocating waters based on diversions rather than depletions, in fact, return flows are never mentioned.")); Appendix to Wyoming's Motion to Dismiss Bill of Complaint at 90 (DAN ASHENBERG, A COOPERATIVE PLAN TO ADMINISTER THE YELLOWSTONE RIVER COMPACT, (Water Resources Division, Montana DNRC Draft Report Nov. 1983) (the Compact "apportions flow based on diversions, not on depletions.")); Appendix to Wyoming's Motion to Dismiss Bill of Complaint at 91 (MONTANA DNRC, YELLOWSTONE RIVER COMPACT 32 (Nov. 29, 1989) ("The apportionment formula in Article V is based on diversions and not depletions.").

Compact), 21 ROCKY MTN. MIN. L. INST. 24 (1976) (emphasis added).

In summary, the Special Master correctly rejected Montana's reading of Section V(A) because Montana ignored vital words and incorrectly interpreted the definition of "beneficial use;" could not account for Section V(A)'s lack of provisions that would be critical to a consumption limitation; ignored the drafter's rejection of a consumption limit; and overlooked the consensus among subsequent commentators.

E. The Special Master Consistently Applied his Construction of Article V(A) to all of Montana's Claims for Relief

Montana contends in its exception that the Special Master analyzed the sprinkler irrigation issue differently than he analyzed Montana's other three claims that involved the interaction of pre-1950 rights in Montana with post-1950 rights in Wyoming. Mont. Exc. at 11, 20-25. Montana argues that the Special Master decided in its favor on those claims based on his determination that Section V(A) created a consumptive use limit on Wyoming water rights. *Id.* at 22-23.

Montana's premise is incorrect. While Montana had argued for the consumptive use limit in its briefs,[5]

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[5] (Mont. Br. in Resp. to Wyo. Mot. to Dismiss Bill of Compl. at 23-35 (May 2008) *and* Mont. Ltr. Br. at 12-15 (July 17, 2009).)

the Special Master clearly rejected it in his first interim report:

> As Wyoming notes, the drafters of the Compact chose not to require Wyoming to deliver a specific, fixed quantity of water to its border with Montana (an approach taken by Article III(d) of the Colorado River Compact, 70 Cong. Rec. 324 (1928)) *or to limit Wyoming to a specific level of consumptive use* (an approach taken by the Upper Colorado River Compact, 63 Stat. 31).

FIR at 28 (emphasis added); *see also* FIR at 59-64.

Montana supports its flawed synopsis of how the Special Master analyzed its first three claims by misreading parts of the Special Master's First Interim Report. For example, Montana claims that when the Special Master mentioned "block protection for all existing, pre-1950 appropriations," he was endorsing a quantitative consumptive use limit on irrigation by Wyoming pre-1950 rights. Mont. Exc. at 20, 23 (*quoting* FIR at 21.) Actually, he only used "block protection" as a synonym for the drafters' tiered approach in which they treated the allocation of post-1950 diversions between the states under the divertible flow method, while treating pre-1950 rights under Section V(A)'s doctrine of appropriation. In the complete sentence that Montana selectively quotes, the Special Master made clear that the drafters did *not* quantify the Section V(A) appropriations. FIR at 21. He wrote: "The final Compact provides block protection for all existing, pre-1950 appropriations,

without attempting to quantify the amounts of those appropriations, and then, after providing for supplemental appropriations for lands already under irrigation, apportions the amount that remains." *Id.* (emphasis added). Montana's unfair characterization of this quotation is further shown in the previous page of the Special Master's report, where he clearly stated that pre-1950 diversions would be governed by the doctrine of appropriation, not by a fixed quantity of consumption in the upstream state. FIR at 20.

As a result of his rejection of Montana's interpretation of Section V(A), the Special Master asked the same question with respect to all four of Montana's claims – whether "the laws governing the acquisition and use of water under the doctrine of appropriation" allowed Montana to state those claims. FIR at 38. He wrote:

> Montana's claims divide into two categories. First, Montana complains that three types of post-1950 water uses in Wyoming are interfering with Montana's pre-1950 uses: (1) irrigation of new acreage; (2) storage of water in new or expanded reservoirs, and (3) groundwater withdrawals. This section of the Report discusses these claims. Second, Montana complains that pre-1950 appropriators in Wyoming have increased their consumption of water on existing acreage to the detriment of Montana's downstream pre-1950 water uses. Because this final claim does not involve a new water use but instead involves a conflict between the water uses of

> two groups of pre-1950 appropriators, it is discussed separately in section III-D of this Report.
>
> Before examining what actions violate Article V(A), it is useful to consider in more depth what Article V(A) means by its reference to the "laws governing the acquisition and use of water under the doctrine of appropriation." Article V(A) provides not for the continued enjoyment of pre-1950 rights in the abstract but for their continued enjoyment in accordance with such laws.

Id.

The Special Master consistently applied the doctrine to each of the claims, and only reached a different result as to the sprinkler irrigation claim because of the claim's particular invalidity under the doctrine. He never accepted or applied a consumptive use limit to Section V(A). This Court should reject Montana's argument that the Special Master's analysis of its four claims relied on inconsistent reasoning.

F. The Special Master Correctly Analyzed the Sprinkler Irrigation Issue under the Doctrine of Appropriation Incorporated by Article V(A)

1. Introduction

In order to answer the question posed by Montana's fourth claim of how pre-1950 Wyoming

water rights would "continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation," the Special Master had to decide how that doctrine treated increases in consumption in 1950. Since sprinkler irrigation was in its infancy in 1950, there were no decided cases on whether an irrigator could, by installing a sprinkler system, increase the portion of legally diverted water that was actually consumed.[6] *See* FIR at 65-66. However, in 1950 there were cases and other authorities on the more general issue of

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[6] In its "Background" to its exceptions, Montana asserts that "typically" only 65% of the water applied to fields through flood irrigation is consumed by crops, and that this percentage is increased when sprinkler systems are employed, thereby reducing return flows when irrigators convert from flood to sprinkler methods. Mont. Exc. at 3. These factual assertions are unsupported by a record, and the State of Wyoming does not concede their truth. The Court should not accept or reject the Special Master's recommendations as to the sprinkler irrigation issue based on Montana's factual assertion of "typical" consumption rates or return flow outcomes. *See United States v. Louisiana*, 363 U.S. 1, 12-13 (1960) (motion in the nature of a motion to dismiss should be decided on the pleadings and reliable documents regarding negotiating history). The amount of water an irrigator diverts from a stream at the headgate at the rate allowed by his water right is always equal to or greater than the amount actually consumed by the crops, regardless of how the water is conveyed from stream to field and how it is applied to the field. *See generally* JOSEPH L. SAX, BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES 128-31 (Thomson/West 2006). Thus, drafters of western interstate water compacts, and courts interpreting them, use care when distinguishing between quantities diverted and quantities consumed.

whether an irrigator could with impunity increase consumption, and correspondingly decrease return flows, through means other than sprinkler systems. *Binning v. Miller*, 102 P.2d 54 (Wyo. 1940); *see also* WELLS A. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 365 (U.S. Gov't Printing Office 1942); I. SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 56 at 51 (3d ed. 1911).

Also, cases decided after 1950 have addressed the general point of increased consumption within the bounds of an irrigation water right, although as the Special Master reported, the courts have yet to address the precise question of increased consumption that results from conversion from flood to sprinkler irrigation. FIR at 77. The Special Master discussed much of this authority in his memorandum opinion and agreed with Wyoming that under the doctrine of appropriation, pre-1950 irrigators could increase the amount of water actually consumed by their crops without being subject to any curtailment demand from Montana pre-1950 irrigators. (Mem. Op. at 37-41.)

In its letter brief, Montana responded at length to the Special Master's analysis of this issue. (Mont. Ltr. Br. at 1-12 (July 17, 2009).) Montana focused on whether the Special Master properly ascertained how increased consumption should be treated under the doctrine of appropriation. *Id.* The Special Master analyzed Montana's contentions in detail, but confirmed his earlier conclusion in his supplemental opinion. (Supp. Opp. at 3 ("I remain convinced that

my ultimate conclusion in the Memorandum Opinion on the question of increased water consumption on existing irrigated acreage is correct.").)

In its exception, Montana has changed its focus, stating that the Special Master should not have even determined how the doctrine of appropriation would treat increases in consumptive use because Section V(A) creates a consumptive limit on Wyoming "beneficial uses" without regard to that doctrine. Montana states: "In light of the plain language of the Compact, it was unnecessary to delve into this issue at all." Mont. Exc. at 34.

Despite this disclaimer of relevancy, Montana devotes a small portion of its exception to some of the Special Master's analysis of the sprinkler irrigation issue. Wyoming will not burden the Court by restating and rebutting all the contentions that Montana made to the Special Master. He dealt directly with each of these contentions in his supplemental opinion and his first interim report. Wyoming will limit its discussion below to the points Montana raises in its exception.

2. The Special Master Correctly Recognized the Appropriation Doctrine's Key Distinction between Cardinal Changes in Water Rights and Changes in Irrigation Management within Basically Unchanged Water Rights

Montana continues to deny a long-established distinction in western water law between: (1) whether

an irrigator may make a cardinal change to his water right to divert from a natural stream when such change could affect the amount of water available to downstream irrigators; and (2) whether an irrigator may make operational changes in the way he delivers water from the stream, applies it to crops, or drains it from fields, thereby reducing return flows. The Special Master emphasized this distinction, explaining how all western states impose a "no injury" rule that protects downstream appropriators from decreased flows resulting from cardinal changes in upstream water rights, such as changes in the point of diversion, change in type of use, or change of place of use. FIR at 66-69. He also explained, however, that western states generally, and Wyoming specifically, does not apply the "no injury" rule to limit an irrigator's consumptive use on his land once the irrigator has diverted water from the stream in a volume within his appropriative right. FIR at 73-74, 78-82.

In its exception, Montana glosses over this distinction. It cites various authorities for the proposition that the doctrine of appropriation protects downstream irrigators through a general guarantee that stream conditions will remain as they were at the time the downstream irrigators obtained their water rights. Mont. Exc. at 34 n.5. However, the courts and commentators assert this generality in the context of attempts by upstream irrigators to make cardinal changes in their water rights. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 173-75 (4th ed.

2009); A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 5:73, at 5-137 (Thomson/West 2007); WELLS A. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 379 (U.S. Gov't Printing Office 1942); I. SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 498, at 532 (3d ed. 1911).

These same authorities state that the "no-injury" rule does not apply to operational changes in practices on the land in the absence of a change in the water right that governs the diversion of the water from the stream. GETCHES, *supra* at 141; TARLOCK, *supra* § 5:17, at 5-31 through 5-32 & n.11 (citing various cases including *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593 (Wyo. 1957); HUTCHINS, *supra* at 365 ("Hence, the owner of the land from which the waste water flows may change his practices so as to reduce the waste, or to prevent it from flowing from his land."); WIEL, *supra* § 56 at 51.

For example, Dean Getches explains the distinction thoroughly in his text, WATER LAW IN A NUTSHELL, 139-45, 175 (4th ed. 2009). The Special Master cited this text correctly in his first interim report, but Montana contends that he mischaracterized Dean Getches' analysis. FIR at 77-78, *citing* DAVID H. GETCHES, WATER LAW IN A NUTSHELL at 144 (2009); Mont. Exc. at 34 n.8, *citing* GETCHES, *supra*. This debate between Montana and the Special Master over Dean Getches' summary of the law is clearly resolved in the Special Master's favor, as shown by Dean Getches' own words taken in fair context:

> An appropriator who seeks to change a use or to transfer a right to another for a changed use must apply to the appropriate administrative body or court for approval which must determine that there is no harm to any water user, senior or junior.
>
> . . . The doctrine of prior appropriation recognizes a right of junior appropriators "in the continuation of stream conditions as they existed at the time of their respective appropriations." Farmers Highline Canal & Reservoir Co. v. City of Golden, 272 P.2d 629 (Colo. 1954). See also Okanogan Wilderness League, Inc. v. Town of Twisp, 947 P.2d 732 (Wash. 1997).
>
> . . . .
>
> Not all actions that injure juniors are subject to the no harm rule. Reuse or more intensive consumptive use of the water on the same land for the same general purposes (e.g., agricultural irrigation), changes in use of imported water (see Section VI B of this chapter) and, in some jurisdictions, certain changes in the point of return are not protected.

DAVID H. GETCHES, WATER LAW IN A NUTSHELL 174-75 (4th ed. 2009).

> Typically, one uses only a portion of the total water diverted and returns the rest to the stream. Water rights are usually expressed as a maximum amount or rate of flow that may be diverted for a certain use

on specific land. A right may also be limited by the amount that may be consumed.[7] Within these limits, consumption may be increased by reuse so long as there is no "change of use" – a change in the place, purpose or time of use, or the means or point of diversion. Thus, an appropriator ordinarily may "recycle" irrigation return flows or capture seepage and use it within limits imposed by state law.

The upstream appropriator's increased efficiency or reuse of water on the original land can potentially reduce the downstream appropriator's supply. Downstream appropriators often are dependent on the upstream appropriator's "waste" as a source of supply. If the increased consumption came about by a change in use, it would not be allowed to harm other appropriators. But when it is the result of recapture and reuse or conservation measures on the same land, it will be permitted without regard to harm caused to others so long as the amount diverted (and the amount consumed, if it has

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[7] Since long before 1950, Wyoming water rights have been formalized in permits and certificates of appropriation. WYO. STAT. ANN. §§ 41-4-501 through -517. The rights expressed in such documents are quantified by the flow an irrigator can withdraw from the stream at his point of diversion. Wyoming has always tabulated and regulated irrigation water rights from streams by the amount diverted, not the amount actually consumed, so Dean Getches' parentheticals indicating the possibility of water rights founded on consumption must involve some other state and are not relevant here.

> been quantified) does not exceed one's "paper right" (i.e., the amount specified in a permit or court decree). The applicable principle is that a junior appropriator who depends on a senior's waste as a source of supply is subject to the waste being curtailed. See Thayer v. City of Rawlins, 594 P.2d 951 (Wyo. 1979). . . .

GETCHES, *supra* at 140-41.

> The rule allowing recapture and resuse of salvaged water on the original land can result in more water being consumed. For instance, if a water user is consuming less than the permitted amount of water and plants a more water-intensive crop or puts in a more efficient irrigation system, most or all of the water that had previously been returned to the stream might be consumed. This can deprive other appropriators of water on which they depend but it is allowed since it is technically within the terms of the original appropriation.

GETCHES, *supra* at 143-44.

A century ago, Samuel Wiel explained the logic drawn from the doctrine of appropriation that prevents the no-injury rule from restricting the amount of water an irrigator may consume once he has reduced water from a natural stream to his possession. He wrote that while the water is in the natural stream it "belongs to the public" and is open to appropriation. But once the water is appropriated by diversion at a headgate and placed in a ditch,

reservoir, pipe or other artificial structure, the irrigator has reduced the *corpus* of the water to ownership. WIEL, *supra* § 52 at 46. Once reduced to ownership, the water is "subject only to such rights of continuance as are derived through the man who carries it and causes it to flow there," and the public loses the right to make claim to it as long as it remains in the possession of its owner. WIEL, *supra* § 53 at 47. The process of consumption, through sprinkler irrigation or otherwise, occurs on the irrigator's land while the water remains in his possession, so he may consume to extinction, if he can.

The Special Master made two policy arguments that support the consensus expressed by Dean Getches and the other commentators. First, the right to unfettered consumption bounded only by the irrigator's appropriative right to divert a particular quantity from the stream encourages irrigators to improve their efficiency in a water-short region. Second, a contrary rule would be very difficult to apply because it would require constant monitoring of irrigation practices on far-flung farm and ranch lands, as compared to the current system of only monitoring quantities of diversions at headgates. FIR at 69-70.

In summary, the Special Master correctly concluded that the Compact drafters intended the doctrine of appropriation incorporated in Section V(A) to allow for increases in consumption by irrigators in the upstream state holding pre-1950 rights. The

Court should accept his recommendation on the sprinkler irrigation issue.

II. This Court should Accept the Special Master's Recommendation that when Montana Irrigators with Pre-1950 Rights do not Receive Sufficient Water to Satisfy those Rights Due to Low Stream Conditions, Montana should First Attempt to Obtain the Necessary Water from within Montana

The second issue that Montana raised in its exception involves a condition the Special Master placed on the ability of Montana to seek a curtailment of Wyoming post-1950 diversions when Montana pre-1950 diversions are short of water at their points of diversion. The Special Master recommended that no curtailment should occur if Montana could overcome the shortage with its own resources, so long as Montana's application of those resources does not result in Montana foregoing other rights under the Compact. FIR at 89. The Court should reject Montana's exception to these curtailment conditions because Montana waived the argument and because the conditions are necessary to harmonize the application of Sections V(A) and V(B).

A. Montana Waived its Exception on this Issue by Failing to Raise it Before the Special Master

The arguments Montana raises in its exception to the Special Master's curtailment conditions have not been previously briefed by either Wyoming, the United States or any *amici*, because Montana raises those arguments here for the first time. Since the Special Master had no chance to consider Montana's arguments or to amplify his explanation for his recommendation in response to such arguments, this Court should deny Montana's exception based on waiver.

If Montana had lacked opportunity to raise its objections to the curtailment conditions that the Special Master announced in his June 2, 2009 memorandum opinion, then no waiver would have occurred. However, as recounted above in the summary of the course of proceedings in this case, Montana had two invitations to argue against the Special Master's recommendation on this issue but failed to do so. Montana certainly knew how to object to anything the Special Master included in his the memorandum opinion. It submitted a lengthy brief on the sprinkler irrigation issue and received 28 pages of exhaustive analysis from the Special Master in response. (Mont. Ltr. Br. at 1-12 (July 17, 2009); Supp. Mem. 1-28 (Sept. 4, 2009).)

Although this Court has not specifically addressed the issue of waiver for failure to argue a

point below in the context of a Special Master's recommendation, it has found waiver in the appellate context. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-46 (1992) (*citing Youakim v. Miller*, 425 U.S. 231, 234 (1976)) (*per curium*).

Lower federal courts have held that waiver for failure to raise an issue below applies when the court employs a special master or magistrate judge to make a recommended decision. *Hellenbrand-Sztaba v. Sec'y of Health and Human Servs.*, 35 Fed. Cl. 222, 225 (1996) (special master); *Borden v. Sec'y of Health and Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987) (magistrate judge).

The United States Court of Appeals for the First Circuit has held that a litigant may not advance for the first time in a district court an argument against a recommendation from a magistrate judge to that court, unless the litigant made that argument to the magistrate judge in the proceedings before him. *Borden*, 836 F.2d at 6. The court explained:

> Appellant was entitled to a de novo review by the district court of the *recommendations to which he objected*, *see Mathews v. Weber*, 423 U.S. 261, . . . however he was not entitled to a de novo review of an argument never raised. *See Singh v. Superintending School Committee*, 593 F. Supp. 1315, 1318 (D. Me. 1984); [other citations] "The purpose of the Federal Magistrate's Act is to relieve courts of unnecessary work." *Park Motor Mart, Inc. v.*

> *Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980). It would defeat this purpose if the district court was required to hear matters anew on issues never presented to the magistrate. Parties must take before the magistrate, "not only their 'best shot' but all of their shots." *Singh*, 593 F. Supp. at 1318. This concept is premised on the same basis as the rule that an appellate court will not consider arguments not raised below except in the most compelling circumstances.

Id.

This Court appointed Special Master Thompson for the express purpose of conducting all proceedings on the motion to dismiss as well as subsequent proceedings, no doubt relying on his background in the specialty of water law to ensure that sound and thoughtful recommendations would reach this Court. While the Special Master's recommendations are not immune from critique by the Court upon exception, surely the time and effort spent by a specialist like the Special Master economizes on the Court's time. The Special Master's exhaustive written review of Montana's multiple briefings of the sprinkler system issue amply demonstrates the contribution of his appointment to the goal of judicial economy.

The purposes behind the Special Master's appointment would be circumvented if Montana could withhold argument from the Special Master despite repeated opportunity, and raise the argument for the first time before this Court. Montana's exception on

the curtailment conditions issue should be denied because Montana has through silence before the Special Master waived the right to take such exception.

B. The Special Master's Decision on the Curtailment Conditions Balanced Montana's Appropriative Rights under Article V(A) with Wyoming's Rights to Percentage Allocations under Article V(B)

As explained above, the Special Master, Wyoming, and the United States have all read Article V(A) to mean that pre-1950 appropriative water rights in both Montana and Wyoming "shall" continue to be enjoyed under "the laws governing the acquisition and use of water under the doctrine of appropriation." Disagreeing with Wyoming, however, the Special Master recommended that "the doctrine of appropriation" incorporated in Article V(A) allowed Montana to claim injury if it could show that Wyoming diversions to post-1950 rights interfered with flows that would otherwise be available for diversion by pre-1950 Montana rights downstream. FIR at 17, 29.

In rejecting Wyoming's argument, the Special Master had to overcome a practical argument Wyoming had made in support of its position. Wyoming correctly emphasized that Article V(B) of the Compact guarantees that through any given date in a given water year, Wyoming water users with

post-1950 rights are allotted 40% of the cumulative annual divertible flow on the Tongue River, and 42% on the Powder River. (Wyo. Br. on Mot. To Dismiss at 46-47 (April 2008).) If a Montana irrigator with a pre-1950 water right could make a call under Article V(A) that closed a Wyoming post-1950 headgate, even though Wyoming's cumulative diversion through that date was below its Article V(B) percentage entitlement, then Montana could use "the doctrine of appropriation" in Article V(A) as a sword to undermine Wyoming's percentage entitlement under Article V(B). *Id.*

The Special Master apparently accepted this concern, because he did not recommend that Montana could always call off post-1950 diversions in Wyoming to satisfy its pre-1950 diverter who could thereby benefit. Instead, he held that a water shortage affecting a Montana pre-1950 right should usually be remedied by intrastate means within Montana rather than by a call to Wyoming to curtail any post-1950 Wyoming diversions in operation. FIR at 27. He wrote:

> Although Wyoming's "self-correction" argument does not undermine either the meaning of or the need for Article V(A), the argument illustrates that Montana may not always need to invoke Article V(A) to protect its pre-1950 uses. Under what circumstances Wyoming must respond to shortages suffered by pre-1950 appropriators in Montana by immediately reducing post-1950 diversions or withdrawals in Wyoming is a factual

> inquiry. Where Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice its other rights under the Compact, an intrastate remedy is the appropriate solution. Where this is not possible, however, the Compact requires that Wyoming ensure that new uses in Wyoming do not interfere with pre-1950 appropriations in Montana. The questions of when "intrastate" remedies are adequate under the Compact and, alternatively, when Wyoming must curtail post-1950 uses pursuant to Article V(A), are best addressed in subsequent proceedings in this case after discovery is complete and an appropriate factual record can be developed.

Id. at 27-28.

By deciding that "the doctrine of appropriation" incorporated in Article V(A) had interstate reach, the Special Master did not completely ameliorate Wyoming's concern about potential loss of its V(B) percentage allocations through a Montana call under V(A). However, the Special Master's curtailment conditions do prevent the prior appropriation doctrine incorporated in Article V(A) from significantly interfering with Wyoming's V(B) allocations. Thus, the Special Master's recommendation vindicates the "cardinal principle of contract construction," "that a document should be read to give effect to all its provisions and to render them consistent with each other." *See Mastrobuono v. Shearson Lehman Hutton,*

Inc., 514 U.S. 52, 63 (1995). This cardinal principle is applicable to the Compact, which is both a contract and a law of the United States. *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.1 (1991).

C. Montana Exaggerates Practical Concerns with the Special Master's Curtailment Conditions

Montana suggests that the requirement that Montana pre-1950 irrigators first satisfy shortages from other Montana resources is impractical because Montana will have to prove that it has investigated its own intrastate resources before Wyoming must curtail its post-1950 diversions. Mont. Exc. at 39-40. This suggestion lacks merit.

Montana, like Wyoming, is a state that employs the doctrine of prior appropriation in its intrastate water management. Under that doctrine, it should be within the normal course of events for Montana water managers to explore whether a Montana post-1950 irrigator is depleting a river upstream of a senior pre-1950 irrigator's diversion point when the latter lacks adequate flow to satisfy his right. *See* MONT. CODE. ANN. §§ 85-2-112 through -113 (duties of Montana Dep't of Natural Res. to administer water rights); *see also* WYO. STAT. ANN. § 41-3-503 (authority of Wyoming water division superintendents to enforce rights of priority of appropriation) *and* § 41-3-603 (authority of Wyoming water commissioners to divide water in streams based on lawful entitlement). This

is simply basic administration under prior appropriation. If in their administration, Montana officials determine that no Montana resource is available to curtail in order to satisfy a pre-1950 right, then Montana will be poised to make demand on Wyoming. The Special Master's requirement of Montana due diligence preceding a curtailment call on Wyoming adds no extraordinary burdens on Montana.

Moreover, Article V(B) of the Compact already requires both states to measure quantities of post-1950 diversions at all headgates whenever there is a concern about violation of the percentage allocations of divertible flow. In fact, shortly after the Compact's enactment the Montana Legislature passed an act requiring post-1950 diverters to install measuring devices for this very purpose. MONT. CODE ANN. §§ 85-20-102 through -106. Checking on contemporaneous post-1950 diversions in Montana to protect pre-1950 rights during low water conditions prior to asserting a call on Wyoming is likely less arduous than compiling statistics of cumulative diversions under V(B).

The members of Montana's delegation that negotiated the Compact were well-versed in Montana prior appropriation law and implementation and surely would not be surprised that the Special Master would recommend that Article V(A) requires some due diligence by Montana when it seeks a Wyoming curtailment in order to benefit from the doctrine of appropriation. Having obtained a recommendation

from the Special Master that the laws governing the doctrine of appropriation incorporated in Article V(A) create a general doctrine of appropriation that allows interstate curtailment, Montana cannot now deny the components of that doctrine which the Special Master has found to be necessary to make the Compact function with internal consistency.

D. This Court should not Rely on Interpretations of other Compacts that do not Contain Language Similar to Article V(A)

Montana contends that the Special Master's requirement that Montana's pre-1950 rights generally seek intrastate satisfaction is inconsistent with what other interstate compacts provide. (Mont. Exc. at 38) Again, Montana looks to the wrong documents for guidance. *See New Jersey v. Delaware*, 552 U.S. 597, 615-18 (2008). While it is true that compacts that require delivery of an annual volume of water at the state line would not trigger downstream regulation as a condition of delivery, the Yellowstone River Compact is not such a compact.

Section V(A) provides that appropriative rights are to be enjoyed under the "laws governing the acquisition and use of water under the doctrine of appropriation." Compact at A-7. The doctrine generally requires that those who assert a claim against upstream appropriators for curtailment of their diversions have a need for that water. JOSEPH L. SAX,

BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES 126, ¶ 8. (Thomson/West 2006). The Special Master's curtailment conditions simply adopt this principle by requiring Montana to have its house in order with respect to its pre-1950 rights before demanding that Wyoming curtail its post-1950 diversions. The Court should reject Montana's exception on this issue.

CONCLUSION

The Court should accept the Special Master's First Interim Report in its entirety, and enter an order on Wyoming's motion to dismiss in the form proposed by the Special Master.

Respectfully submitted,

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No. 137, Original

IN THE

Supreme Court of the United States

STATE OF MONTANA,
Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,
Defendants.

On Motion to Dismiss the Bill of Complaint, Motion for Partial Summary Judgment, and Motion to Intervene

FIRST INTERIM REPORT OF THE SPECIAL MASTER

BARTON H. THOMPSON, JR.
Special Master
Stanford, California

February 10, 2010

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BOOKS, TREATISES, & ARTICLES

David H. Getches, Water Law in a Nut Shell (2009) 77-78
Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 Land & Water L. Rev. 63 (1987) 50
Douglas L. Grant, *Private Interstate Suits*, in 4 Waters and Water Rights ch. 44 (Robert E. Beck ed., 2004 repl. vol.) 24

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Wells A. Hutchins, Selected Problems on the Law of Water Rights in the West (1942) 76
Wells A. Hutchins, The Montana Law of Water Rights (1958) 49
Wells A. Hutchins, Water Rights Laws in the Nineteen Western States (1971) 85
Long on Irrigation (2d ed.) 73
Michael McIntyre, *The Disparity Between State Water Rights Records and Actual Water Use Patterns: "I Wonder Where the Water Went?,"* 5 Land & Water L. Rev. 23 (1970) 51
Joseph L. Sax et al., Legal Control of Water Resources: Cases and Materials (4th ed. 2006) 82
C.F. Tolman & Amy C. Stipp, *Analysis of Legal Concepts of Subflow and Percolating Waters*, 21 Or. L. Rev. (1942) 49
Frank J. Trelease, *Reclamation Water Rights*, 32 Rocky Mtn. L. Rev. 464 (1960) 65
Samuel C. Wiel, Water Rights in the Western States (3d ed. 1911) 46-49, 84
Samuel C. Wiel, *Need of Unified Law for Surface and Underground Water*, 2 S. Cal. L. Rev. 358, 362 (1921) 49, 60
Water Encyclopedia: Science and Issues 46
Waters and Water Rights (Robert E. Beck ed.) 4, 5, 61
Webster's New World Law Dictionary (2006) 17

TABLE OF AUTHORITIES—Continued

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Lawrence J. Wolfe & Jennifer G. Hager, *Wyoming's Groundwater Laws: Quantity and Quality Regulation*, 24 Land & Water L. Rev. 39 (1989) 50-51

MISCELLANEOUS

Memorandum in Support of the Motion of the City of Philadelphia for Leave to Intervene and To File an Answer to the Petition of the City of New York for Modification for the Decree, *New Jersey v. New York*, No. 5, Original, March 7, 1953 109

IN THE

Supreme Court of the United States

No. 137, Original

STATE OF MONTANA,
Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,
Defendants.

On Motion to Dismiss the Bill of Complaint, Motion for Partial Summary Judgment, and Motion to Intervene

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FIRST INTERIM REPORT OF THE SPECIAL MASTER

This case deals with the entitlements of the States of Montana and Wyoming to the waters of the Powder and Tongue Rivers, two interstate tributaries to the Yellowstone River. Both tributaries begin in Wyoming and then flow north into Montana where they merge into the main stem of the Yellowstone River. Rights to water in the Powder and Tongue Rivers, as well as other parts of the Yellowstone River system, are governed by the Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951) (the

"Compact"). Montana argues that various actions in Wyoming violate the Compact by depriving Montana of water to which it is entitled under the Compact.

This First Interim Report addresses three pre-trial motions: (1) Wyoming's motion to dismiss Montana's Bill of Complaint, (2) Montana's motion for partial summary judgment regarding the Compact's coverage of tributaries to the Powder and Tongue Rivers, and (3) Anadarko Petroleum Corporation's motion to intervene as a party. The next step in this case will be discovery.

This is an appropriate time for the Supreme Court to examine and consider the issues that have arisen in the case to date. Wyoming's motion to dismiss and Montana's motion for partial summary judgment present major legal issues that are critical to an ultimate decision in this matter. Resolution of these two motions will limit and frame the future proceedings, including discovery, and may encourage settlement discussions among the parties. It is also important to come to a final resolution of Anadarko's motion to intervene prior to discovery, so that the parties can agree on the scope of and procedure for discovery.

As discussed below, I recommend that the Court deny Wyoming's motion to dismiss, grant in part Montana's motion for partial summary judgment, and deny Anadarko's motion to intervene.

I. THE RECORD

The principal record for purposes of the motions addressed in this First Interim Report consists of the Compact, Montana's Bill of Complaint, and the various briefs filed in support of or in opposition to the three motions. A copy of the Compact is attached as

Appendix A. In preparation for the hearing on Wyoming's motion to dismiss, I also asked the parties to compile and file a Joint Appendix of all documents relating to the history of the Compact on which they expected to rely or that they believed relevant to the motion. There is no dispute as to the authenticity of the documents in the Joint Appendix, although Montana and Wyoming disagree over the relevance of some of the documents. Copies of the Joint Appendix are being lodged with the Court concurrent with the filing of this Report.[1]

II. BACKGROUND

A. The Yellowstone River System

Montana and Wyoming have extensively developed the Yellowstone River system for irrigation. The Yellowstone River runs in a generally northern direction for almost 700 miles from the slopes of Yount Peak in Wyoming through Montana and into North Dakota to its confluence with the Missouri River soon after crossing the North Dakota border. The Yellowstone River has four principal tributaries—the Bighorn, Clarks Fork, Powder, and Tongue rivers—all of which begin in Wyoming and flow North across the border with Montana before joining the main stem in Montana. The Yellowstone River and its tributaries together drain a large area of approximately 70,000 square miles. *See* Appendix C.

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[1] In this Report, documents in the Joint Appendix are referenced as Joint App., followed by the relevant page numbers. References to the transcript of the hearings held on each of the motions are indicated by "Hearing Trans." and the name of the relevant hearing in parentheses (*e.g.*, "Hearing Trans. (Motion to Dismiss)"), followed by the relevant pages and lines of the transcript.

This case focuses on the Powder and Tongue rivers. Both tributaries begin in the Big Horn Mountains of Wyoming and then travel into Montana where they ultimately join the main stem of the Yellowstone River. The Tongue River basin is approximately 5,400 square miles in size, while the Powder River basin covers over 13,000 square miles. Irrigation is the primary use of the waters of the tributaries in both states. According to the Bill of Complaint, the production of coalbed methane has led also to sharp increases in recent years in the pumping of groundwater in the portion of the Powder River basin lying in Wyoming. Bill of Complaint ¶ 11. *See also* Montana's Brief in Support of Motion for Leave to File Bill of Complaint, Jan. 2007, p. 4 ("Montana's Brief in Support of Leave to File"). Although Montana's Bill of Complaint alleges violations of the Compact only on the Powder and Tongue rivers, the Compact covers the Yellowstone River and all of its tributaries, and resolution of this case could have implications for water rights throughout the Yellowstone River system.

B. Background Principles of Water Law

Like most western states, Montana and Wyoming follow the law of prior appropriation in allocating both surface water and groundwater. 6 Waters and Water Rights 473 & 865 (Robert E. Beck ed., 1994 repl. vol.). Under the prior appropriation doctrine, water uses that are prior in time are generally prior in right. As the Wyoming State Constitution has provided since statehood, "Priority of appropriation for beneficial uses shall give the better right." Wyoming Const., Art. 8, § 3.

As a general matter, an appropriative water right in the western United States gives a water user the

entitlement to divert a specified flow of water, typically measured today in the pre-metric unit of "cubic feet per second," from a particular point on a waterway for specific use on particular land. Where there is insufficient water in a stream to meet the right of a given appropriator, the prior appropriation doctrine generally gives the appropriator the right to demand that any upstream appropriators who are junior in time reduce or, if necessary, cease their diversions to the extent necessary to ensure that the more senior appropriator receives the water to which he or she is entitled. When a senior appropriator wishes to require a junior appropriator to reduce or cease its diversions, the senior appropriator "calls" the river.

Although both Montana and Wyoming follow the prior appropriation doctrine, specific rules and institutions of the prior-appropriation systems in Montana and Wyoming have differed at various points in time. Wyoming, for example, was the first state in the nation to adopt an administrative structure for administering appropriative rights; under this system, water users must apply for and obtain a permit from the State Engineer. *See* Wyo. Stat. Ann. §§ 41-4-501 to -502, 6 Waters and Water Rights, *supra*, at 865-866. In Montana, by contrast, water users could acquire rights on most streams before 1973 merely by putting the water to a beneficial use.[2] 6 Waters and Water Rights, *supra*, at 473. Determining the existing rights on a waterway

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[2] Where a court had determined and "adjudicated" the water rights on a particular stream, new water rights could be obtained by filing a petition in the court that had conducted the adjudication. 6 Waters and Water Rights, *supra*, at 473.

in Montana prior to 1973, therefore, was often a complex task. Montana finally adopted a permit system for appropriative water rights in 1973.

C. The Yellowstone River Compact

Montana, Wyoming, and North Dakota have apportioned the waters of the Yellowstone River and its tributaries through the Yellowstone River Compact. Water shortages were not a major problem at the time that the states negotiated the Compact. The "compelling reason" for negotiating the Compact was instead to open the way for getting federal assistance for new water storage facilities in the basin. Senate Rep. No. 883, 82d Cong., 1st Sess. 6 (1951), Joint App. 12, 17 ("Senate Rep. No. 883"). As in other instances around the nation, Congress wanted agreement on the division of the waters of the Yellowstone River system among the states before building or funding new storage projects.

1. Negotiations & Approval

Congress first gave its consent to Montana and Wyoming to negotiate a compact in 1932. Act of June 14, 1932, 47 Stat. 306. Negotiators for the two states and the federal government agreed to a proposed compact on February 6, 1935. *See* 1935 Draft Yellowstone River Compact, Joint App. 274 ("1935 Draft Compact"). The proposed compact allocated water among users of the two states under the doctrine of prior appropriation. Water use was to be "subject to appropriation for beneficial use under the laws of the separate states and under general water-right law as interpreted by the Courts." *Id.*, Art. V(a), Joint App. at 278. Each existing appropriator was to be entitled to the beneficial use of the stream flow that he enjoyed "when he appropriated,

undiminished by the use of any later appropriator or by any increased use of earlier priority." *Id.*, Art. V(b), Joint App. at 278-279. Neither the Montana nor Wyoming legislature approved the 1935 Draft Compact. *See* Senate Rep. No. 883, *supra*, at 5, Joint App. at 16.

In 1937, Congress gave Montana and Wyoming permission to restart negotiations (50 Stat. 551 (1937)) and, in 1940, authorized North Dakota to join the negotiations (54 Stat. 399 (1940)). Negotiators for all three states agreed to a new proposed compact on December 31, 1942. *See* 1942 Draft Yellowstone River Compact, Joint App. 253 ("1942 Draft Compact"). The new draft took a different approach to apportioning the waters of the Yellowstone River system. Article V(A) of the 1942 Draft Compact apportioned to each state specified percentages of the "divertable daily flow" of the main stem and each major tributary of the Yellowstone River. *Id.* at 261-264. Article VI "recognized" present vested rights in each state, but emphasized that all "rights to the beneficial use of the waters of the Yellowstone River System, heretofore and hereafter established under the laws of any signatory State, shall be satisfied solely from the proportion of the water allotted to that State as provided in Article V." *Id.* at 266-267. The 1942 Draft Compact fared no better in gaining legislative approval than had the 1935 Draft Compact. The Wyoming legislature refused to approve the 1942 Draft Compact as agreed to by the negotiators, and the legislatures of the other two states declined to accept Wyoming's proposed amendments. Senate Rep. No. 883, *supra*, at 5, Joint App. at 16.

In 1944, Congress again authorized the three states to negotiate a compact (58 Stat. 117), leading to the negotiation and signing of a new compact on December 18, 1944. *See* 1944 Draft Yellowstone River Compact, Joint App. 238 ("1944 Draft Compact"). The 1944 Draft Compact was similar in most key respects to the 1942 Draft Compact. Article V(A) again apportioned to each state specified percentages of the "divertable daily flow" of the main stem and each major tributary of the Yellowstone River. Joint App. at 244-246. Article VI again "recognized" present vested rights and provided that they would be "administered by the proper officials of the respective States." *Id.* at 247. As before, all such rights were to be "satisfied solely from the proportion of the water allotted to [each] State as provided in Article V." *Id.* Although the legislatures of all three states voted to ratify the proposed compact, the governor of Wyoming vetoed the proposed compact. Senate Rep. No. 833, *supra*, at 5, Joint App. at 16.

For the Yellowstone River Compact, four times was the charm. In 1949, Congress yet again gave its consent to the three states to negotiate a compact "providing for an equitable division or apportionment between the States of the water supply of the Yellowstone River and of the streams tributary thereto." Act of June 2, 1949, 63 Stat. 152. Soon thereafter, Montana, North Dakota, and Wyoming appointed a negotiating commission, known as the Yellowstone River Compact Commission. The Commission included representatives of the three states, as well as a number of federal agencies. *See* Yellowstone River Compact Commission, Meeting Minutes of Nov. 29, 1949, Joint App. 89, 92, 108-112 ("November 1949 Meeting Minutes"). The Commission first met on November 29, 1949 in Billings, Montana. *Id.* at 91.

An Engineering Committee, consisting of engineers from the three states and various federal agencies, did much of the work for the Commission. *See* Senate Rep. No. 883, *supra*, at 6, Joint App. at 17. During the negotiations, the Commission considered a number of different draft compacts, including the Burke Draft, dated April 14, 1950 (Joint App. 124), the Myers Draft, dated September 18, 1950 (*id.* 195), and the Engineering Committee Draft, undated (*id.* 160). After a year of negotiations, the Commission agreed to and signed the final version of the Compact on December 8, 1950. Yellowstone River Compact Commission, Meeting Minutes of Dec. 7-8, 1950, at 13-14, Joint App. 34, 50-51 ("December 1950 Meeting Minutes"). The three states each ratified the Compact in early 1951. Act of Feb. 13, 1951, ch. 39, 1951 Mont. Laws 58 (codified at Mont. Code Ann. § 85-20-101); Act of March 7, 1951, ch. 339, 1951 N.D. Laws 505 (codified at N.D. Cent. Code § 61-23-01); Act of Jan. 27, 1951, ch. 10, 1951 Wyo. Sess. Laws 7 (codified at Wyo. Stat. Ann. § 41-12-601). Congress consented to the Compact later that same year. Act of Oct. 30, 1951, ch. 629, 65 Stat. 663.

2. *Key Provisions of the Compact*

Although the Compact deals broadly with the rights of all three states to the waters of the Yellowstone River system, the "real problem" addressed by the Compact was how to apportion the waters of the principal tributaries between Montana and Wyoming. Senate Rep. No. 883, *supra*, at 6, Joint App. at 17. Unlike the tributaries, the main stem of the Yellowstone River lies "almost entirely in Montana," and the negotiators believed that its water supply was "adequate for feasible developments along its course." *Id.* And while North Dakota participated in

negotiating the Compact and various provisions of the Compact protect its interests, North Dakota's "real interest" was "minor on account of the very small part of the drainage basin that is within its borders." *Id.* *See also* November 1949 Meeting Minutes, *supra*, at 6, Joint App. at 97 (statement of North Dakota representative).

The preamble to the Compact notes the desire of Montana, North Dakota, and Wyoming to "remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries." The preamble also notes the states' desire to "provide for an equitable division and apportionment of such waters."

Article V allocates the waters of the Yellowstone River system among the three states and is the key substantive provision of the Compact for purposes of this action. Article V differentiates between appropriative rights existing as of January 1, 1950 ("pre-1950 appropriative rights") and subsequent water uses. Article V(A) addresses pre-1950 appropriative rights:

> Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Article V(B) then apportions "the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950." Of these "unused and unappropriated waters," Article V(B) first allocates to each state

> such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V [*i.e.*, for the pre-1950 rights], such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

Article V(B) then allocates fixed percentages of "the remainder of the unused and unappropriated water" of each tributary to Montana and Wyoming "for storage or direct diversions for beneficial use on new lands or for other purposes." In the case of the Tongue River, for example, the Compact allocates 40% of such waters to Wyoming and the remainder to Montana. Under Article V(C), these percentages are to be applied on a yearly basis to the algebraic sum of:

> (1) diversions "for irrigation, municipal, and industrial uses . . . developed after January 1, 1950,"
>
> (2) the "net change in storage . . . in all reservoirs . . . completed subsequent to January 1, 1950,"
>
> (3) the "net change in storage . . . in existing reservoirs . . . which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950," and
>
> (4) the instream flow at a "point of measurement" below the last diversion from the tributary before its confluence with the main stem of the Yellowstone River.

Article II defines relevant terminology used in the Compact. Article III provides for a Commission (consisting of a representative each of Montana,

Wyoming, and the United States Geological Survey) with the "power to formulate rules and regulations and to perform any act which it may find necessary to carry out the provisions of this Compact." Compact, Art. III(E). Article XIII provides that nothing in the Compact "shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, in any Federal Court or the United States Supreme Court, for the protection of any right under this Compact or the enforcement of any of its provisions."

D. The Bill of Complaint

The Supreme Court granted leave to Montana to file its Complaint in 2008. 552 U.S. 1175 (2008). In the Complaint, Montana alleges that Wyoming has violated Article V of the Compact by refusing to "curtail consumption of the waters of the Tongue and Powder Rivers in excess of Wyoming's consumption of such waters existing as of January 1, 1950," whenever the water is needed to meet Montana's pre-1950 appropriative rights. Bill of Complaint ¶ 8. Montana more specifically alleges that Wyoming has violated Montana's rights under Article V by allowing:

- Irrigation of new acres (*id.* ¶ 10),
- Construction and use of "new and expanded storage facilities" (*id.* ¶ 9),
- New groundwater withdrawals and "the pumping of groundwater associated with coalbed methane production" (*id.* ¶ 11), and
- Increased consumption of water on existing acres (*id.* ¶ 12).

The discussion of Wyoming's motion to dismiss in the next section of the Report provides greater detail on these various allegations.

North Dakota is named as a defendant to Montana's cause of action because it is a signatory to the Compact. Bill of Complaint ¶ 4. Montana seeks no relief against North Dakota in its Complaint. Brief in Support of Motion for Leave to File Bill of Complaint, *supra*, p. 3. As a result, North Dakota has not filed any briefs in this case or presented any oral argument, although it has attended all hearings and participated in status conferences.

The United States is not a party to this case. Although federal lands such as Yellowstone National Park and Indian reservations such as the Northern Cheyenne Indian Reservation are in the greater Yellowstone River basin, the Compact expressly states that its provisions should not be construed to impact either Indian water rights (Compact, Art. VI) or water rights of the United States (*id.*, Art. XVI). Because compacts possess the status of federal law once approved by Congress and because the United States administers water projects in the Yellowstone River basin that this case could affect, the views of the United States in this case are still important. The Supreme Court invited the Solicitor General to file a brief addressing Montana's motion for leave to file a bill of complaint (550 U.S. 732 (2008)). I have continued to seek the views of the United States on all aspects of the case, and the Solicitor General at my invitation has filed *amicus* briefs and participated in the oral argument on all three motions addressed in this Report.

III. WYOMING'S MOTION TO DISMISS

At the same time that the Court granted Montana leave to file it Complaint, the Court also allowed Wyoming 45 days to file a motion to dismiss. 552 U.S. 1175 (2008). Wyoming subsequently filed its

Motion to Dismiss on a timely basis. After the motion was briefed, the Supreme Court appointed me to serve as Special Master and referred the Motion to Dismiss to me to resolve. ___ U.S. ___ (Oct. 20, 2008).

Wyoming moves to dismiss the Complaint on the ground that the Complaint fails to state a claim upon which relief can be granted under the terms of the Compact. Wyoming asserts that the Compact does not require Wyoming to provide sufficient water at the state line of the Powder and Tongue Rivers to satisfy Montana's pre-1950 water uses—even when the water is not needed to satisfy Wyoming's pre-1950 water uses. Wyoming also argues that none of the specific actions that Montana alleges in its Complaint can violate the Compact.

Briefs were filed on the Motion to Dismiss by Montana and Wyoming, as well as by three *amici*—the United States and the Northern Cheyenne Tribe (both in opposition to the Motion to Dismiss) and Anadarko Petroleum Corporation (in support of the Motion to Dismiss).[2] Council for Montana, Wyoming, and the United States presented oral arguments at a hearing on the Motion to Dismiss held in Denver, Colorado on February 3, 2009.

I conclude that Article V of the Compact protects pre-1950 appropriations in Montana from new surface and groundwater diversions in Wyoming,

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[2] Counsel for all parties consented to the filing of the Northern Cheyenne Tribe's *amicus* brief. Because Montana did not consent to the filing of Anadarko Petroleum Corporation's *amicus* brief, Anadarko moved for leave to file its brief. The Supreme Court referred that motion to me (___ U.S. ___ (Oct. 20, 2008)), and I granted the motion. Case Management Order No. 1, ¶ 6 (Nov. 25, 2008).

whether for direct use or for storage, that prevent adequate water from reaching Montana to satisfy those pre-1950 appropriations. Montana, however, cannot insist that Wyoming release storage water for the benefit of pre-1950 appropriations in Montana if the water was stored at a time when there was adequate water reaching Montana to satisfy those appropriations. Nor can Montana object to efficiency improvements by pre-1950 appropriators in Wyoming if the Wyoming appropriators put the conserved water to use on their existing acreage for the same purpose as before. Moreover, if Montana can remedy water shortages facing pre-1950 appropriators in Montana through purely intrastate means (*e.g.*, by reducing deliveries to post-1950 uses in Montana) that do not prejudice Montana's other rights under the Compact, an intrastate remedy is the appropriate solution. When this is not possible, however, the Compact requires Wyoming to ensure that new diversions in Wyoming do not prevent sufficient water from reaching the border to enable Montana to satisfy its pre-1950 appropriations.

Although some of Montana's specific allegations do not state a claim for relief, Montana sets out several alternative factual bases for its claim of a violation of the Compact. I therefore recommend that the Motion to Dismiss be denied.

A. Standard of Review

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides guidance in ruling on Wyoming's Motion to Dismiss. In particular, the factual allegations of Montana's Bill of Complaint should be assumed to be true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-556 (2007); *Neitzke v. Williams*, 490 U.S. 319, 326-327 (1989). And the Bill of Com-

plaint should be liberally construed in favor of Montana. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

The rules for interpreting interstate compacts are also clear. An interstate compact that has been approved by Congress is both a contract and a federal statute. *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). If the text of a compact is unambiguous when placed in context, the text is conclusive. *Kansas v. Colorado*, 514 U.S. 673, 690 (1995). *See also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) (cardinal rule in interpreting statutes is that unambiguous wording is conclusive). If the text is ambiguous, "it is appropriate to look to extrinsic evidence of the negotiation history of the Compact" and to the legislative history before Congress. *Oklahoma v. New Mexico*, *supra*, 501 U.S. at 235 n.5.

B. Article V of the Compact Protects Pre-1950 Water Rights in Montana from Subsequent Diversions and Withdrawals in Wyoming

1. The Language of Article V is Clear and Unambiguous

The language of Article V of the Compact unambiguously protects pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming subsequent to January 1, 1950. As already noted, Article V(A) provides that pre-1950 rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." This language is instructive in several important respects. First, it mandates the *continued enjoyment* of pre-1950 rights.

The word "enjoy" means "[t]o have the *undisturbed use* or possession of something, particularly real property." Webster's New World Law Dictionary 133 (2006) (emphasis added). The Compact, moreover, pairs the term "enjoyed" with the mandatory term "shall"—requiring that action be taken under the Compact to ensure the continued enjoyment of pre-1950 appropriative rights. Montana water users would not "continue to . . . enjoy[ ]" pre-1950 water rights, under the common and straightforward meaning of those words, if Wyoming were free to allow new diversions or withdrawals that interfere with pre-1950 Montana appropriations. Confirming the natural meaning of this language, the Compact uses similar language to provide for the acquisition and protection of supplemental water rights. *See* Compact, Art. V(B) ("such supplemental rights to be acquired *and enjoyed* in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation" (emphasis added)).

Second, Article V(A) provides for continued enjoyment *under the appropriation doctrine*. As explained earlier, the essence of the appropriation doctrine is the concept of first in time, first in right, under which earlier or "senior" appropriators are protected from the actions of later or "junior" appropriators. As the Supreme Court explained in an early equitable apportionment action involving the appropriation doctrine, "The cardinal rule of the doctrine is that priority of appropriation gives superiority of right." *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922). The reference in Article V(A) to the "doctrine of appropriation" would be stripped of its defining characteristic if Wyoming could permit new water diversions and withdrawals that interfere with earlier pre-1950 appropriative rights in Montana.

Article V(B) further confirms the Compact's intent to protect pre-1950 appropriative rights by providing that supplemental water supplies for land already under irrigation, as well as water for "storage and direct diversions for beneficial use on new lands or for other purposes," are to be allocated from the "*unused* and *unappropriated* waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950" (emphasis added). Under this language, new water users cannot take water that is already appropriated and used by pre-1950 appropriators. Instead, new water users must draw from those waters that were *unappropriated* as of January 1, 1950.

Read together, Articles V(A) and V(B) of the Compact establish a three-level hierarchy.

(1) First, pre-1950 appropriative rights are to "continue to be enjoyed." Compact, Art. V(A). These pre-1950 rights receive the highest priority under the Compact.

(2) "Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950," water goes next to "provide supplemental water supplies" for pre-1950 right holders. Compact, Art. V(B), 1st clause. These supplemental water rights, like pre-1950 rights, are to be "enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Compact, Art. V(B), 2nd clause.

(3) Finally, the "remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes" according to

the percentages specified for each tributary. Compact, Art. V(B), 3rd clause.

2. *Wyoming's Arguments Are Inconsistent with the Clear and Unambiguous Meaning of Article V(A)*

Wyoming argues that Article V(A) merely recognizes pre-1950 water rights under each state's water laws, without requiring Wyoming to curtail post-1950 uses when needed to ensure that adequate water reaches Montana to protect pre-1950 appropriations in Montana. According to Wyoming, "the drafters intentionally withheld from the Compact any directive or mechanism by which a water user in Montana could make an interstate 'call' to shut down the diversion of a Wyoming water user whose rights were junior to a Montana user's right." Wyoming's Motion to Dismiss Bill of Complaint, April 2008, p. 37 ("Motion to Dismiss"). Wyoming claims that the drafters instead "intended the states to regulate . . . pre-1950 diversions . . . under their own laws, unimpaired by the Compact." *Id.*, p. 43. Under Wyoming's reading of the Compact, Montana would administer its pre-1950 uses, and Wyoming would administer its pre-1950 uses, but Montana, the downstream state, could not demand that Wyoming provide sufficient water to meet the needs of Montana's pre-1950 uses.

The fundamental flaw in Wyoming's argument is that the language of the Compact does not merely recognize pre-1950 appropriative rights, but affirmatively protects them. Prior negotiators knew how to recognize the water rights of each state without protecting those rights from subsequent water uses in the other state. The 1942 Draft Compact, for example, provided simply that present vested rights

"are recognized by this Compact," without using any words of affirmative protection. 1942 Draft Compact, *supra*, Art. VI, Joint App. at 266. The 1944 Draft Compact similarly "recognized" present vested rights and provided that such rights would be "administered by the proper officials of the respective States." 1944 Draft Compact, *supra*, Art. VI, Joint App. at 247. The final Compact, by comparison, provides not for the *recognition* but for the *continued enjoyment* of pre-1950 rights, and it provides that such rights will be "enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation," not under the separate laws of Montana and Wyoming. Compact, Art. V(A).

A comparison of the underlying structures of the Compact and the various draft compacts that preceded it is also instructive. Both the 1942 and 1944 draft compacts attempted to apportion the waters of each tributary among the three states by (1) taking an initial amount of the flow in the tributary and awarding both Montana and Wyoming a percentage of that flow, and then (2) providing that any remaining "unappropriated" waters in the tributary could be appropriated under the law of each state. The draft compacts protected pre-existing rights in both Montana and Wyoming by taking the amounts of those rights into account in setting the percentage of the initial flow awarded to each state. The 1942 Draft Compact, for example, allocated to Wyoming the great bulk of the first 4,600 acre-feet of daily flows from the Powder River between May 1 and September 30. 96 ½ percent of the first 2,000 acre-feet would have gone to Wyoming, and only 3 ½ percent to Montana; 60% of the next 2,600 acre-feet would have gone to Wyoming, and 40% to Montana. 1942 Draft Compact, *supra*, Art. V(A)(4), Joint App.

at 246. The drafters allocated more water from the Powder River to Wyoming because it had more of the irrigation rights in the basin at that time. *See* Federal Power Comm'n, Preliminary Report on Yellowstone River Basin 169 (Dec. 1940), Joint App. 505, 684. Water for all existing rights were to be "satisfied solely" from these amounts. 1942 Draft Compact, *supra*, Art. VI, Joint App. at 247. Unappropriated daily flows in excess of these allocated amounts, as well as all unappropriated flows from October 1 to April 30, were "subject to future appropriation . . . in Wyoming, Montana, and North Dakota in accordance with the laws of said respective States." *Id.*, Art. V(A)(4), Joint App. at 246.

The final Compact, by contrast, takes a quite different approach. Rather than dividing an initial amount of flow in each tributary between Montana and Wyoming and then providing for the appropriation of any remaining amounts, the final Compact provides for percentage apportionments of the "unused and unappropriated water" remaining after satisfying appropriative rights existing as of January 1, 1950 and any supplemental water supplies needed for such rights. Compact, Art. V(B). Because Article V(A) protects existing rights, Article V(B) allocates smaller percentages of the remaining unappropriated waters to Wyoming than the percentages used by the draft 1942 and 1944 compacts. *Id.* The final Compact essentially flips the approach of the earlier drafts. The earlier drafts apportioned an initial flow, taking into account existing rights, and provided for the appropriation of any additional, unappropriated water. The final Compact provides block protection for all existing, pre-1950 appropriations, without attempting to quantify the amounts of those appropriations, and then, after providing for supplemental

appropriations for lands already under irrigation, apportions the amount that remains.

The decision to provide block protection of all pre-1950 rights and not to include those rights in the numerical division of waters avoided the "huge and time-consuming task" of quantifying such rights in 1951. Senate Rep. No. 883, 82d Cong, *supra*, at 6, Joint. App. at 17. As noted earlier, Montana, North Dakota, and Wyoming all had "differing water laws and practices in establishing water rights." *Id.* Determining the quantity of pre-1950 rights would have been a difficult task, particularly in Montana which lacked a permit system. The approach adopted by the Compact provided for the protection of pre-1950 rights without the need for a contemporaneous quantification of those rights.

Another problem with Wyoming's argument that Article V(A) merely recognizes without protecting pre-1950 rights is that it would render Article V(A) superfluous. Both Montana and Wyoming already recognized and protected their own pre-1950 rights. Unless Article V(A) requires each state to recognize and protect pre-1950 rights existing in the other state, the provision would appear to do nothing that existing law did not already provide—rendering it mere surplusage. Federal statutes, and thus interstate compacts, should be read, "where possible, so as to avoid rendering superfluous any parts thereof." *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991). *See also Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) (interpreting a statutory provision to avoid making it superfluous).

If the Compact merely recognizes without protecting pre-1950 appropriative rights in Montana, interference with pre-1950 rights would also remain a

potential source of future controversy and could potentially trigger an equitable apportionment action before the Supreme Court. Yet the parties to the Compact emphasized in its preamble that it was their desire to "remove *all* causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries" (emphasis added). Wyoming's reading of the Compact, by leaving open a major source of controversy, would defeat the Compact's express goal to remove all such causes of controversy. Although the preamble by itself is not conclusive, it provides further support for the clear and natural reading of Article V(A). *See, e.g., Virginia v. Maryland*, 540 U.S. 56, 68-69 (2003) (using the preamble of an interstate compact as an interpretive aid).

Wyoming responds to these points by suggesting that Article V(A) plays an independent role in resolving future disputes by precluding Montana and its pre-1950 appropriators from seeking any judicial relief against diversions and withdrawals in Wyoming that interfere with the pre-1950 appropriations. At the hearing on the Motion to Dismiss, I asked counsel for Wyoming whether Article V(A), under Wyoming's interpretation, achieves anything more than if the drafters had simply left pre-1950 appropriative rights out of the Compact completely. Counsel responded:

> It does. Because if you exclude them from the Compact, then Montana is free to bring an equitable apportionment claim at a later date. . . . . [What the negotiators] wanted to do was to preempt, which is to try to reduce all causes of future

> controversy with respect to the water in the Yellowstone River, and do an equitable division.

Hearing Trans. (Motion to Dismiss), p. 25, lines 15-18, & p. 26, lines 8-11. Under Wyoming's reading of the Compact, in short, Article V(A) plays an important role and resolves future controversies regarding pre-1950 rights in Montana by precluding any interstate protection for them.

The language of the Compact, however, does not support this reading of Article V(A). No language in the Compact suggests an intent to preclude the protection of pre-1950 appropriative rights across state lines. Instead, as discussed above, Article V(A) expressly mandates their continued enjoyment. It strains credulity, moreover, to argue that Montana was willing to give up interstate protection of its pre-1950 appropriative rights in entering into the Compact—and that it did so without clear language to that effect. Prior to the Compact, individual appropriators in Montana were free to bring actions in federal or state court to block new water uses in Wyoming that interfered with their prior appropriative rights. *See Bean v. Morris*, 221 U.S. 485 (1911) (allowing an action by a Wyoming appropriator against a Montana appropriator in federal court in Montana); *Willey v. Decker*, 73 P. 210, 224 (Wyo. 1903). *See generally* Douglas L. Grant, *Private Interstate Suits*, in 4 Waters and Water Rights ch. 44 (Robert E. Beck ed., 2004 repl. vol.). If the interference was severe enough, Montana could also have brought an equitable apportionment action in the United States Supreme Court. *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589 (1945). Under Wyoming's interpretation of Article V, however, Montana gave up its right and those of its citizens and left pre-1950

appropriative rights in Montana exposed to potential interference from new uses in Wyoming.

Wyoming also argues that there is no need to read Article V(A) as allowing Montana to demand enough water from Wyoming to satisfy the rights of Montana's pre-1950 appropriators "because the percentage allocation scheme of Section B and C [of Article V of the Compact] obviates the need for such demands." Wyoming's Reply Brief in Support of its Motion to Dismiss Bill of Complaint, May 2008, p. 11 ("Wyoming's Reply Brief"). As Wyoming notes, if new diversions in Wyoming deprive a pre-1950 appropriator in Montana of some or all of its water, the pre-1950 appropriator may have some intrastate remedies: the appropriator may be able to make a "call" on more junior appropriators in Montana, draw on water stored in Montana for the needs of post-1950 appropriators, or divert unappropriated water that would otherwise flow out the mouth of the tributary. *Id.*, p. 14. To the extent this reduces the amount of water that post-1950 appropriators use in Montana, the Compact may then require Wyoming to reduce its post-1950 appropriations in order to stay within the percentage allocations set out in Article V(B) for such new appropriations. *See id.*, pp. 14-15. In Wyoming's view, the Compact thereby "self-corrects" by forcing Wyoming to reduce post-1950 appropriations under Article V(B). *Id.*

To understand Wyoming's argument, it is useful to work through a simple hypothetical.[1] As described above, Article V(B) allocates fixed percentages of "unused and unappropriated water" (what the

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[1] To keep the numbers simple, the hypothetical assumes no storage or return flow.

Compact labels "divertible flow") in each tributary to Montana and Wyoming. Under Article V(C), the divertible flow is determined on a yearly basis by summing post-1950 diversions and storage, as well as instream flows at the base of the tributaries. Assume that, over the course of a given water year,[5] there is 10,000 acre-feet of divertible flow available in a tributary and that both Montana and Wyoming would normally fully use their allocations of this water. If Montana is entitled to 60% and Wyoming 40%, new users in Montana could use 6,000 acre-feet, and new users in Wyoming could use 4,000 acre-feet.

Assume next that a new Wyoming user starts to use an additional 500 acre-feet a year of water, depriving a pre-1950 appropriator in Montana of water needed for his crops. Under Montana state law, the pre-1950 appropriators could "call" the river in Montana and force post-1950 appropriators in Montana to reduce their withdrawals by 500 acre feet. Although divertible flow under Article V(C) remains the same, Wyoming is now using 4,500 acre feet of the divertible flow, which exceeds its percentage allocation, while Montana is using only 5,500 acre-feet, which is less than its allocation. Article V therefore would require Wyoming to reduce its post-1950 diversions by 500 acre-feet to 4,000 acre-feet and would allow Montana to increase its post-1950 diversions by 500 acre-feet to 6,000 acre-feet, bringing the overall system "back into balance" without the need for any separate interstate action under Article V(A). In Wyoming's view, the Compact

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[5] Under Article V(C) of the Compact, water calculations are made on the basis of a "water year" that begins on October 1 rather than a calendar year.

thereby "self-corrects across state lines." Wyoming's Reply Brief, *supra*, p. 14.

Wyoming's argument, however, depends on the existence of an adequate intrastate remedy. This will not always be the case. Intrastate remedies and Article V(B), for example, do not help Montana's pre-1950 appropriators when there is insufficient water passing the state line into Montana even to meet the needs of pre-1950 Montana appropriators and when there is no post-1950 storage in Montana from which to draw. In that situation, pre-1950 appropriators in Montana would not be able to remedy their shortages within the Montana system, and Montana would be forced to rely on the interstate protections of Article V(A). Although Wyoming suggests that the answer is to build more storage in Montana (*id.*, p. 15), the Compact does not require Montana to add more storage capacity, and there is no evidence that Montana gave up the right to protect its pre-1950 uses from new uses in Wyoming on the mere hope that storage capacity in Montana would always be adequate.

Although Wyoming's "self-correction" argument does not undermine either the meaning of or the need for Article V(A), the argument illustrates that Montana may not always need to invoke Article V(A) to protect its pre-1950 uses. Under what circumstances Wyoming must respond to shortages suffered by pre-1950 appropriators in Montana by immediately reducing post-1950 diversions or withdrawals in Wyoming is a factual inquiry. Where Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice its other rights under the Compact, an intrastate remedy is the appropriate solution. Where

this is not possible, however, the Compact requires that Wyoming ensure that new uses in Wyoming do not interfere with pre-1950 appropriations in Montana. The questions of when "intrastate" remedies are adequate under the Compact and, alternatively, when Wyoming must curtail post-1950 uses pursuant to Article V(A), are best addressed in subsequent proceedings in this case after discovery is complete and an appropriate factual record can be developed.

Wyoming finally argues that requiring it to curtail post-1950 uses in Wyoming whenever needed to protect pre-1950 appropriations in Montana is inconsistent with the system used by the Compact to apportion the "unused and unappropriated water" of the tributaries under Articles V(B) and V(C). As Wyoming notes, the drafters of the Compact chose not to require Wyoming to deliver a specific, fixed quantity of water to its border with Montana (an approach taken by Article III(d) of the Colorado River Compact, 70 Cong. Rec. 324 (1928)) or to limit Wyoming to a specific level of consumptive use (an approach taken by the Upper Colorado River Compact, 63 Stat. 31). Instead, the drafters chose an approach under which the two states, after providing for the continued enjoyment of pre-1950 rights and supplemental water rights, share any remaining divertible flow of the tributaries by fixed percentages (a "divertible-flow approach"). *See* Compact, Art. V(B); Senate Rep. No. 883, *supra*, at 7, Joint App. at 18. The drafters, moreover, chose to calculate the percentages based on cumulative flows and diversions over the course of "an annual water year," rather than daily flows and diversions. *See* Compact, Art. V(C).

Protection of pre-1950 appropriations under Article V(A), by contrast, requires Wyoming to ensure on a constant basis that water uses in Wyoming that date from after January 1, 1950 are not depleting the waters flowing into Montana to such an extent as to interfere with pre-1950 appropriative rights in Montana. Wyoming argues that the drafters could not have intended that Article V(A) would protect pre-1950 appropriations in Montana on a daily basis when Articles V(B) and V(C) provide for the apportionment of other waters on a yearly cumulative basis. Motion to Dismiss, *supra*, pp. 43-50.

By the terms of the Compact, however, the cumulative divertible-flow approach of Articles V(B) and V(C) applies only to the "quantity of water subject to the percentage allocations" in Article V(B)—*i.e.*, to new uses. Compact, Art. V(C). There is nothing inconsistent in protecting pre-1950 appropriative rights through the typical process for protecting senior appropriative rights under the prior appropriation doctrine, while allocating the "unused and unappropriated water" of the tributaries under a cumulative divertible-flow approach. Both steps can be taken under the Compact without creating any conflicts. Western states regularly require junior appropriators to reduce their diversions when needed to protect the water rights of senior appropriators. Article V(A) establishes a similar, interstate requirement for the waters of the Yellowstone River tributaries in those situations where it is necessary to protect pre-1950 appropriations in Montana. Article V(A) of the Compact, on the one hand, and Articles V(B) and V(C), on the other, address different tasks and, as a result, take different but compatible approaches.

3. *The History of the Compact Supports the Unambiguous Meaning of Article V(A)*

Because the language of Article V(A) clearly and unambiguously protects pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming that interfere with those rights, there is no need to rely on the history of the Compact to interpret that language. *See, e.g., Kansas v. Colorado*, 514 U.S. 673, 690 (1995) (clear language is conclusive). The history of the Compact, however, confirms that Article V(A) was intended to protect pre-1950 appropriations from interstate interference by new diversions and withdrawals.

From the very outset of the negotiations that led to the final Compact, two major themes emerged regarding existing water rights. The first theme was the importance of protecting existing water uses. Second, the parties agreed that it would be exceptionally difficult and ultimately unnecessary to try to integrate and prioritize all existing appropriative rights throughout the Yellowstone River system and across state lines (so that a 1924 appropriator in Montana, for example, could object to diversions by a later 1932 appropriator in Wyoming). *See, e.g.*, Letter from Engineering Committee to Commission Chair R.J. Newell, Oct. 23, 1950, at 2, Joint App. 230, 232 ("It would be a major research project to place existing rights in all States on an equivalent basis"). As a result, the final Compact protects pre-1950 appropriative rights from new post-1950 diversions and withdrawals, but does not attempt to set up a system for administering all pre-1950 rights on an integrated, interstate basis.

At a discussion during the February 1950 meeting of the negotiating commission of the principles to be

used in developing the Compact, several speakers spoke of the importance of protecting existing rights. *See, e.g.*, Yellowstone River Compact Commission, Meeting Minutes of Feb. 1-2, 1950, at 3, Joint App. 75, 78 (comments of T.R. Person) (existing rights should be "recognized and remain unimpaired") ("February 1950 Meeting Minutes"); *id.* at 5, Joint App. at 80 (comments of Commissioner R.E. McNally on behalf of the Wyoming members of the Tongue River committee) (Wyoming commissioners want all existing rights recognized in both states).[1] Throughout the negotiations, Montana representatives repeatedly insisted on the protection of existing rights under the doctrine of prior appropriation. *See, e.g.*, Yellowstone River Compact Commission, Meeting Minutes of Oct. 24-25, 1950, at 6-7, 11, 13, Joint App. 54, 60-61, 65, 67 ("October 1950 Meeting Minutes"); February 1950 Meeting Minutes, *supra*, at 3, Joint App. at 78. Wyoming representatives were no less vocal in their call for protecting established appropriative rights. *See, e.g.*, Letter from Commissioner R.E. McNally to Wyoming Members of the Yellowstone River Compact Commission, Oct. 3, 1950, Joint App. 285.

The key phrasing found in Article V(A) of the Compact first appeared in an April 14, 1950 draft of a proposed compact prepared by W.J. Burke of the United States Bureau of Reclamation. The draft

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[1] Copies of the meeting minutes of the Yellowstone River Compact Commission were not included with the Congressional reports on the Compact, but copies were "furnished for the official files of the appropriate committees of Congress and for the General Services Administration of the United States for filing with the original of the compact." Senate Rep. No. 883, *supra*, at 6, Joint App. at 17.

provided that appropriative rights existing as of January 1, 1950 in the Tongue River "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Burke Draft, *supra*, Art. V(A)(3), Joint App. at 137. The "*unappropriated* waters of the Tongue River System subsequent to January 1, 1950" were then to be split between Montana (receiving 60%) and Wyoming (40%). *Id.* (emphasis added).

The negotiators spent considerable time discussing existing rights at the October 24-25, 1950 meeting of the Yellowstone River Compact Commission. A wide variety of views were expressed. As noted by W.J. Burke of the Bureau of Reclamation, however, "there seemed to be no question about recognizing existing rights, that the question was what body would enforce those rights, the Courts or a Compact Commission." October 1950 Meeting Minutes, *supra*, at 7, Joint. App. at 61. At the meeting session on October 25, the negotiating commission turned its attention to detailed drafting of the compact and voted to take the language quoted above from the Burke Draft and apply it to all the waters of the Yellowstone River system, rather than just to the waters of the Tongue River. *Id.* at 17, Joint App. at 71. *See also* Engineering Committee Draft, *supra*, Art. V(A), Joint. App. at 171 (containing the final language of Article V(A)).

At the same meeting, the negotiators rejected the idea of having a compact commission administer pre-1950 appropriative rights as one integrated prior-appropriation system without regard to state line, which would have permitted a pre-1950 appropriator in one state to "call" a more junior pre-1950 appropriator in another state during periods of shortage. One of Montana's commissioners moved to amend the

language of the Burke draft to provide that existing appropriative rights would be administered by "the principle of priority, regardless of state line." October 1950 Meeting Minutes, *supra*, at 17, Joint App. at 71. Following discussion, however, the proposed amendment was dropped. Wyoming stated that it would not agree to such "interstate administration" of existing appropriative rights. *See, e.g., id.* at 13, Joint App. at 67 (comments of Commissioner R.E. McNally of Wyoming).

At least one proposed draft of the compact would not have affirmatively protected pre-existing water rights, but would have excluded them entirely from the compact's coverage. In September 1950, Carl L. Myers, who worked for the Bureau of Reclamation and chaired the Engineering Committee, sent a "rough draft of a possible Compact" to representatives of the three states. Letter from Carl L. Myers to Fred Buck *et al.*, Sept. 19, 1950, Joint App. 195, 196. The first principle on which the draft was based was that "[e]xisting rights [should] be undisturbed and not administered under the Compact." *Id.* Pursuant to this principle, Article V(D) of the draft compact "excluded from the provisions of this Compact . . . 2. Established rights to the beneficial use of water in each signatating [sic] State existing on January 1, 1951 . . . ." Myers Draft, *supra*, Art. V(D), Joint App. at 207. The apportionment provisions of the draft compact, in turn, stated that the apportionments were to be "exclusive of established rights . . . coming within the provisions of paragraph D . . . ." *Id.* at 206. Rather than taking this approach, however, the drafters adopted the language that is now found in Article V(A) of the Compact.

Discussion at the final negotiating session on December 7-8, 1950 confirms the intent of the negotiators to protect pre-1950 appropriative rights. In discussing article V(B) of the proposed compact, for example, W.J. Burke of the Bureau of Reclamation

> discussed the basis on which the Compact was drafted and the general theory of the Compact. Yields of the basin are to be *burdened* by (1) existing appropriative rights and (2) supplemental water for existing developments. The remainder, the *unappropriated* and unused water, or residual water, is to be compacted.

December 1950 Meeting Minutes, *supra*, at 4, Joint App. at 41 (emphasis added).

The House and Senate committee reports on the Compact make it clear that the drafters of the Compact did not intend to create an integrated system for administering priority disputes among pre-1950 appropriative rights. The drafters saw little need for the Compact to resolve such disputes. According to the Congressional reports, the drafters apparently believed that there was sufficient water to meet all pre-1950 appropriative rights if the water was "properly conserved by storage." Senate Rep. No. 883, *supra*, at 6-7, Joint App. at 17-18. As a result, "little could be gained, from a water supply standpoint, by attempting in the compact, the regulation and administration of existing appropriative rights in the signatory States." *Id.* at 11, Joint App. at 22. *See also* House Rep. No. 1118, 82d Cong., 1st Sess. 2 (1951), Joint App. 24, 26 ("House Rep. No. 1118").

At the same time, however, the Congressional reports make clear that it was the intent of the Compact to protect pre-1950 appropriative rights in

one state from interference by post-1950 diversions and withdrawals in another. The reports emphasize that Article V(A) recognizes pre-1950 rights and "permits the continued enjoyment of such rights in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Senate Rep. No. 883, *supra*, at 11, Joint App. at 22; House Rep. No. 1118, *supra*, at 3, Joint App. at 27. New and supplemental rights under Article V(B) are to come from residual waters remaining after pre-1950 rights are satisfied. "The unused and unappropriated waters of the interstate tributaries only are treated; *i.e.*, the waters that are residual to those *required for the enjoyment of the appropriative rights that are recognized in paragraph A of article V*." Senate Rep. No. 883, *supra*, at 11, Joint App. at 22 (emphasis added). *See also* House Rep. No. 1118, *supra*, at 3, Joint App. at 27 (same).

Congressional discussions of the United States' interests in the waters of the Yellowstone River system also confirm that Congress' intent was to protect pre-1950 rights. In response to an expressed concern that the Compact would not adequately protect rights in a federal reclamation project on the lower Yellowstone River, for example, the House Committee on Interior and Insular Affairs noted that Article V(D), "[*c*]*onsidered with paragraph A of Article V*, . . . gives to the lower Yellowstone Federal reclamation project in Montana and North Dakota the *protection* of a right existing on January 1, 1950."

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[1] Article V(D) provides, "All existing rights to the beneficial use of waters of the Yellowstone River in the States of Montana and North Dakota, below Intake, Montana, valid under the laws of these States as of January 1, 1950, are hereby recognized and

House Rep. No. 1118, *supra*, at 3, Joint App. at 27 (emphasis added). And in response to concerns that Article V(B)'s allocation of "unused and unappropriated waters" between Montana and Wyoming might injure the United States, the Senate Committee on Interior and Insular Affairs responded that, "Article V-B, it is true, allocates to the States the 'unused and unappropriated waters,' but this follows V-A which recognizes all existing beneficial uses as of January 1, 1950." Senate Rep. No. 883, *supra*, at 3, Joint App. at 14.

Various comments in both the Congressional reports and the minutes of the Compact negotiations note that it was not the intent of the drafters to "regulate" or "administer" pre-1950 water rights. *See, e.g.*, Senate Rep. No. 883, *supra*, at 2, Joint App. 13 ("No regulation of the supply is mentioned for the satisfaction of those rights"); *id.* at 11, Joint App. at 22 ("little could be gained . . . by attempting in the compact, the regulation and administration of existing appropriative rights"); House Rep. No. 1118, *supra*, at 2, Joint App. at 26 (same); October 1950 Commission Minutes, *supra*, at 6, Joint App. at 60 (same); *id.* (Wyoming did not want a "provision in the Compact that existing rights shall be administered under the Compact by the Administrative Commission that may be established"); *id.* at 13, Joint App. at 67 ("Wyoming would not agree to interstate administration"). Read in context, however, each of these comments refer to the decisions by the negotiators either (1) to exclude pre-1950 appropriations from the percentage allocations of divertible flow under Articles V(B) and V(C), or (2) not to subject all

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shall be and remain unimpaired by this Compact." Joint. App. at 6.

pre-1950 water rights, no matter where located, to a unified and integrated regulatory system under the management of the Yellowstone River Compact Commission. None of the comments suggests that the states, Congress, or the drafters intended to leave pre-1950 appropriations in one state unprotected from interference by new diversions or withdrawals in another state.

4. Summary

Wyoming's argument ultimately boils down to the contention that Montana has no means, other than what Wyoming refers to as the "self-correcting" mechanism of Article V(B), to protect pre-1950 appropriative rights in Montana against new diversions or withdrawals of water in Wyoming that prevent sufficient water from reaching Montana. If a new Montana water user interferes with a pre-1950 appropriator in Montana, the appropriator would be entitled to block that use in Montana state court. But under Wyoming's interpretation of the Compact, Montana gave up the right to block water diversions by new users who sit on the other side of the border. Article V(A), however, clearly and unambiguously protects pre-1950 appropriative rights in Montana from new diversions or withdrawals in Wyoming that prevent sufficient water from reaching Montana. As Article V(A) states, pre-1950 appropriative rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation."

C. Montana's Specific Allegations of Violations Resulting from New Surface Diversions, Storage, and Groundwater Withdrawals in Wyoming

Wyoming also argues that the specific actions about which Montana complains cannot constitute a violation of Article V, even if Article V(A) provides general protection to pre-1950 appropriators. Montana's claims divide into two categories. First, Montana complains that three types of post-1950 water uses in Wyoming are interfering with Montana's pre-1950 uses: (1) irrigation of new acreage, (2) storage of water in new or expanded reservoirs, and (3) groundwater withdrawals. This section of the Report discusses these claims. Second, Montana complains that pre-1950 appropriators in Wyoming have increased their consumption of water on existing acreage to the detriment of Montana's downstream pre-1950 water uses. Because this final claim does not involve a new water use but instead involves a conflict between the water uses of two groups of pre-1950 appropriators, it is discussed separately in section III-D of this Report.

Before examining what actions violate Article V(A), it is useful to consider in more depth what Article V(A) means by its reference to the "laws governing the acquisition and use of water under the doctrine of appropriation." Article V(A) provides not for the continued enjoyment of pre-1950 rights in the abstract but for their continued enjoyment in accordance with such laws. In some instances, therefore, the "laws governing the acquisition and use of water under the doctrine of appropriation" may determine or help guide what is and is not protected under Article V(A). Where the relevant law of appropriation is clear in

both Montana and Wyoming, and the laws of the two states agree, applying the language of Article V(A) is not a problem. If the law of the two states is unclear, the laws of the two states differ, or the law has changed since the Compact was negotiated, what law to apply is less clear.

Article V(A) does not provide for the use of water under the "laws of the separate states," as the 1935 Draft Compact did. *See* 1935 Draft Compact, *supra*, Art. V(a), Joint App. at 278. Instead, Article V(A) of the final Compact refers generically to "the laws governing the acquisition and use of water under the doctrine of appropriation," suggesting that the Compact incorporates a general concept of appropriation law rather than the law of any specific state. The analysis that follows therefore looks first but not exclusively to the laws of Montana and Wyoming, and also includes an examination of (1) relevant decisions of the United States Supreme Court regarding the appropriation doctrine, and (2) general practice in applying appropriation law in other western states. Thankfully, the laws of Montana and Wyoming do not appear to directly disagree on the issues raised by Wyoming's Motion to Dismiss, although the law of one or the other state is sometimes clearer on relevant points. The laws of Montana and Wyoming on key issues also appear to be compatible with the general principles of appropriation law applied in other western states. An examination of general appropriation law in the western United States, however, helps in understanding and interpreting the law of the two states.

Article V(A) also does not specify whether it incorporates the law of prior appropriation at the time when the Compact was negotiated or when a

dispute arises. "It is a fundamental tenet of contract law that parties to a contract are deemed to have contracted with reference to principles of law existing at the time the contract was made." *Kansas v. Colorado*, 533 U.S. 1, 89 (2001) (O'Connor, J., dissenting), citing *Norfolk & Western R. Co. v. Am. Train Dispatchers*, 499 U.S. 117, 129-130 (1991). There is no evidence, however, that Congress or the ratifying states intended to freeze prior appropriation law for the pre-1950 appropriations protected by Article V(A). Otherwise, pre-1950 appropriations in the Yellowstone River system could be subject to legal rules totally different from those applying to all other appropriations in the states. It is again unnecessary to resolve this question of timing in order to resolve Wyoming's Motion to Dismiss, although the question may need to be addressed in future proceedings in this case. The discussion that follows includes references to cases and statutes subsequent to the negotiation of the Compact, but primarily for the purpose of understanding and confirming the law of prior appropriation at the time of the Compact.

1. Irrigation of New Acreage in Wyoming Can Violate Article V of the Compact

Montana alleges that "Wyoming has allowed new acreage to be put under irrigation in the Tongue and Powder River Basin, in violation of Montana's rights under Article V of the Compact." Complaint ¶ 10. Wyoming disagrees. Motion to Dismiss, *supra*, p. 54. Wyoming's argument relies principally on the same arguments discussed in Part III-B of this Report and have no greater weight here than before. Article V(A) clearly protects pre-1950 appropriations in Montana from irrigation of new acreage in Wyoming if that

irrigation prevents sufficient water from reaching Montana. Protecting senior appropriations from new water diversions and uses is the essence of prior appropriation. Article V(B), moreover, explicitly subordinates "direct diversions for beneficial use on new lands" to both pre-1950 appropriations and "supplemental water supplies."

Wyoming correctly observes that one of the purposes of the Compact "was to encourage the compacting states to proceed with irrigation of new acreage by establishing a firm understanding of how divertible flow would be allocated to such new acreage." Motion to Dismiss, *supra*, p. 54. There is no evidence in the record, however, that Congress or the state legislatures that approved the Compact intended to encourage the irrigation of new acreage at the cost of pre-1950 appropriators losing the security of their rights. As discussed, the Compact expressly subordinates the provision of water for use on new lands under Article V(B) to the continued enjoyment of pre-1950 appropriative rights under Article V(A).

2. Construction and Use of New or Expanded Water Storage Facilities Can Violate Article V of the Compact

Montana also alleges that "Wyoming has allowed construction and use of new and expanded water storage facilities in the Tongue and Powder River Basins, in violation of Montana's rights under Article V of the Compact." Complaint ¶ 9. According to Montana, eight reservoirs have been built or enlarged in Wyoming's portion of the Tongue River Basin since January 1, 1950, expanding storage capacity by 9,400 acre-feet. Montana's Brief in Support of Leave to File, *supra*, p. 14. The Powder River Basin in

Wyoming has seen the construction or enlargement of seven reservoirs during this period, according to Montana, expanding capacity by 216,000 acre-feet. *Id.*

Wyoming argues that the construction and use of new and expanded water storage facilities cannot violate the Compact. Motion to Dismiss, *supra*, pp. 50-54. As Wyoming correctly observes, the Compact "does not restrict the construction of reservoirs, but instead, encourages it in both states." *Id.*, p. 50. For the reasons discussed earlier, however, Article V(A) of the Compact clearly proscribes diversions of water into storage facilities in Wyoming for new beneficial uses beginning after January 1, 1950 if those diversions prevent adequate water from reaching pre-1950 appropriators in Montana. Under Article V, the "storage" of water for either "beneficial uses on new land" or "supplemental water supplies" on existing acreage is to come only from "unused and unappropriated water," after protecting the continued enjoyment of pre-1950 appropriations.

Montana, however, cannot demand that Wyoming release water from its reservoirs to meet the needs of pre-1950 appropriators in Montana if the water was stored at a time when the needs of the pre-1950 appropriators were fully met. As Wyoming notes, the law of prior appropriation in both Wyoming and Montana provides that the key question in determining the lawfulness of storage is whether water was stored "in priority," not whether senior appropriators need water after the water has been stored. *See, e.g., Federal Land Bank v. Morris*, 116 P.2d 1007, 1011-1012 (Mont. 1941); *Kearney Lake Land & Reservoir Co. v. Lake DeSmet Reservoir Co.*, 475 P.2d 548, 551 (Wyo. 1970). Counsel for Montana conceded this

point at the February 3, 2009 hearing on Wyoming's Motion to Dismiss. Hearing Trans. (Motion to Dismiss), p. 59, line 22 to p. 60, line 1 ("we agree with Wyoming that the general rule of prior appropriation provides that, if you store in priority, you may use out of the priority").

3. Groundwater Development in Wyoming Can in Some Situations Violate Article V(A) of the Compact

Montana finally alleges that "Wyoming has allowed the construction and use of groundwater wells for irrigation and for other uses and has allowed the pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins." Complaint ¶ 11. According to Montana, such pumping "has the potential to deplete the compacted waters of the Powder and Tongue Rivers" and thus deprive Montana of water needed to satisfy its pre-1950 appropriations. Montana's Brief in Support of Leave to File, *supra*, p. 15.

Wyoming argues that the Compact governs only "surface water, not groundwater." Motion to Dismiss, *supra*, p. 59. Whether groundwater withdrawals in Wyoming can violate Article V(A) of the Compact is a more difficult question than whether new surface water uses or storage can do so. The Compact never uses the term "groundwater." This does not end the inquiry, however, because the United States Supreme Court has found that several other interstate river compacts regulate at least some groundwater withdrawals even though they never use the word "groundwater." *See Kansas v. Colorado*, 543 U.S. 86, 91 (2004) (1949 Arkansas River Compact); *Kansas v. Nebraska*, 530 U.S. 1272 (2000) (1942 Republican River Compact). In determining whether interstate

river compacts regulate groundwater extractions, the Supreme Court and prior special masters have looked to determine whether the language of the compact is sufficiently broad and inclusive to clearly encompass groundwater even though groundwater is never explicitly mentioned. *See, e.g.*, First Report of the Special Master, *Kansas v. Nebraska*, No. 108, Orig., pp. 19-23 (Jan. 28, 2000).

The language of the Compact in this case is sufficiently broad and inclusive to encompass at least some forms of groundwater that are hydrologically connected to the surface waters of the Powder and Tongue Rivers. The starting point for resolving coverage of groundwater is again Article V(A), which provides that pre-1950 appropriative rights in the "Yellowstone River System . . . shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation."

Three elements of Article V(A) demonstrate its coverage of at least some forms of hydrologically connected groundwater. First, Article V(A) provides without any limitation that pre-1950 rights "shall continue to be enjoyed." Article V(A) does not protect pre-1950 rights only from surface diversions or storage; instead, it provides broadly for the continued enjoyment of such rights. According to Montana's allegations, new groundwater withdrawals in Wyoming are no different than new surface diversions; both directly interfere with the continued enjoyment of pre-1950 surface rights in Montana. As the Special Master recognized in *Kansas v. Nebraska*, the pumping of water that is hydrologically connected to surface water can deplete the surface water as surely as a surface diversion. *See* First Report of the Special

Master, *Kansas v. Nebraska*, No. 108, Orig., pp. 22-23 (Jan. 28, 2000). If Article V(A) were read to incorporate a silent restriction that the Compact protects pre-1950 appropriations only against surface diversions, post-1950 water users in Wyoming who found their surface diversions limited as a result of Article V(A) could switch to groundwater withdrawals even if the adverse consequences to pre-1950 appropriators in Montana were largely similar.

Second, Article V(A) protects rights in the "Yellowstone River System"—which Article II(D) defines, in relevant part, as "the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River." Compact, Art. II(D). This language again does not appear to exclude groundwater. To the contrary, the broad language of Article II(D), including its use of the terms "sources," "springs," and "swamps," indicates an intent to cover all waters including groundwater. As scientists and courts recognized for decades prior to the negotiation of the Compact, groundwater is a significant source of water for many rivers and streams. *See, e.g.*, *Snake Creek Mining & Tunnel Co. v. Midway Irrigation Co.*, 260 U.S. 596, 598 (1923) (explaining how groundwater finds its way into the surface channels of streams).* A "spring," moreover, is

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* In *Snake Creek Mining & Tunnel Co.*, a mining company collected and brought to the surface groundwater that fed a spring. As the Supreme Court noted, the practice had "materially diminished" the stream waters. Unless the groundwater was permitted to flow into the stream, "a material part of the lands historically reclaimed and irrigated thereunder will be without water and their cultivation must be discontinued." 260

> a location where *groundwater naturally emerges from the Earth's subsurface* in a defined flow and in an amount large enough to form a pool or stream-like flow. Springs can discharge fresh groundwater either onto the ground surface, *directly into the beds of rivers or streams*, or directly into the ocean below sea level. Springs form the headwaters of some streams.

Water Encyclopedia: Science and Issues, www.waterencyclopedia.com (emphasis added). A "swamp," in turn, is an older name for a "wetland," which is merely "an area that is periodically or permanently saturated or covered by surface water or *groundwater*." *Id.* (emphasis added).

Third, as noted above, Article V(A) mandates that pre-1950 appropriative rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the *doctrine of appropriation*" (emphasis added). Beginning with cases in the late 19th century, courts employing the appropriation doctrine have generally managed the surface channel of a river jointly with any groundwater clearly known to be hydrologically interconnected to the surface channel. One of the most frequently cited treatises on western water law during the first half of the 20th century was Samuel C. Wiel, Water Rights in the Western States (3d ed. 1911). As Wiel explained, where groundwater was "directly connected with the flow of a definite stream, the western cases . . . usually regarded the stream rights as the principal, and the ground water as but incident to the stream, subordinating the ground-

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U.S. at 606. Relying on Utah law, the Supreme Court held that the groundwater was part of the stream. *Id.*

water claimants to the stream claimants." 2 *id.* § 1076, at 1010. The courts gave differing names to such groundwater, depending on the particular facts: "underground streams," the "subflow of a stream," and "percolations tributary to watercourses." No matter what the name, however, the cases generally treated the groundwater as part of any hydrologically interconnected surface channel and barred groundwater withdrawals that interfered with senior surface appropriators. *See id.* § 1077, at 1011-1012 (underground streams), §§ 1078-1081, at 1012-1021 (subflow of a stream), § 1082, at 1022-1025 (percolations tributary to surface watercourses).

The Supreme Court recognized that groundwater can be hydrologically interconnected with a surface channel and should in at least some instances be treated as part of that channel in its first equitable apportionment case, *Kansas v. Colorado*, 206 U.S. 46 (1907). An issue in that case was the proper treatment of groundwater that flowed alongside the Arkansas River. According to the Court, this water was properly treated as the

> accumulation of water which will always be found beneath the bed of any stream whose bottom is not solid rock. . . . If the entire volume of water passing down the surface was taken away the subsurface water would gradually disappear, and in that way the amount of the flow in the surface channel coming from Colorado into Kansas may affect the amount of water beneath the subsurface. As subsurface water, it percolates on either side as well as moves along the course of the river, and the more abundant the subsurface water the further it will reach in its percolations on either side, as well as more

> distinct will be its movement down the course of the stream. The testimony therefore given in reference to this subsurface water, its amount and its flow, bears only upon the question of the diminution of the flow from Colorado into Kansas caused by the appropriation in the former state of the waters for the purposes of irrigation.

Id. at 114-115. *See also Snake Creek Mining & Tunnel Co.*, *supra*, 260 U.S. at 606 (holding that, as a matter of Utah appropriation law, a mining company could not intercept and collect groundwater that otherwise would have flowed to surface appropriators).

Particularly relevant for this case is the groundwater that Wiel labeled "percolations tributary to surface waterways"—groundwater that does not lie beneath or alongside the bed of a waterway but that ultimately feeds the surface channel. 2 Wiel, *supra*, § 1082, at 1022-1025. As Wiel explained, the law initially treated such groundwater as separate from surface channels because the linkage between the two was unclear. By the time that Wiel wrote his treatise, however:

> More recent scientific investigation has dispelled much of this mystery concerning the movement of underground water. . . . . If, on the proof, the percolations are shown to be tributary to the spring or watercourse in a material degree, the loss of them causing a substantial diminution of the spring or watercourse, they are now treated as a component part of the watercourse, and follow rights on the watercourse, and rights therein are not regarded as underground rights separate therefrom.

Id. at 1022-1023. *See also id.* § 337, at 358-359 (stream appropriators have a right to block hostile diversions from "underground percolations tributary" to the surface channel); C.F. Tolman & Amy C. Stipp, *Analysis of Legal Concepts of Subflow and Percolating Waters*, 21 Or. L. Rev. 113 (1942); Samuel C. Wiel, *Need of Unified Law for Surface and Underground Water*, 2 S. Cal. L. Rev. 358, 362 (1921).

Forty years prior to the negotiation of the Compact, the Montana Supreme Court recognized the scientific and legal linkage between surface waterways and tributary groundwater. In *Smith v. Duff*, 102 P. 984, 986 (Mont. 1909), the Montana Supreme Court wrote, "It must not be forgotten that the subsurface supply of a stream, whether it comes from tributary swamps or runs in the sand and gravel constituting the bed of the stream, is as much a part of the stream as is the surface flow and is governed by the same rules." Three years later, in *Ryan v. Quinlan*, 124 P. 512 (Mont. 1912), the Montana Supreme Court held that groundwater in general was not subject to the legal rules for surface water, but was the property of overlying landowners. *Id.* at 515-516. At the same time, however, the court reaffirmed that groundwater "flowing in defined channels" or "tributary to a stream" was "subject to the same rules as water flowing in surface streams" (although there was no presumption that groundwater was tributary to a stream). *Id.* at 516. *See generally* Wells A. Hutchins, The Montana Law of Water Rights 111-112 (1958) (underground streams and subflow of surface streams are the same as surface water under Montana law).

When Montana finally adopted a permit system for appropriative rights in 1973, it applied the system to both surface and groundwater. *See* Mont. Code Ann.

§ 85-2-109(19); *see also* Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 Land & Water L. Rev. 63, 64 (1987). Under Montana's current water provisions, junior uses may not impair or adversely affect senior rights. *See* Mont. Code Ann. § 85-2-311(1)(b).

Wyoming law was less clear on the issue of interconnected groundwater and surface water when the Compact was negotiated. At that time, Wyoming courts had apparently never dealt with the question of hydrologic interconnections between groundwater and surface water. Hearing Trans. (Motion to Dismiss), pp. 44-45. The Wyoming legislature had recently passed a groundwater statute that subjected all new groundwater withdrawals to the prior appropriation system, but the statute was silent on whether and how to integrate groundwater withdrawals with hydrologically interconnected surface channels. *See* 1947 Wyo. Sess. Laws ch. 107. When Wyoming passed a new groundwater statute in 1957, however, it explicitly provided for the legal integration of hydrologically interconnected groundwater and surface water:

> Where . . . underground waters and the waters of surface streams are so interconnected as to constitute in fact one source of supply, priorities of rights to the use of all such interconnected waters shall be correlated and such single schedule of priorities shall relate to the whole common water supply.

Wyo. Stat. Ann. § 41-3-916. *See also id.* § 41-3-915 (providing corrective measures for cases of interference, including ordering junior appropriators to cease or reduce withdrawals); Lawrence J. Wolfe &

Jennifer G. Hager, *Wyoming's Groundwater Laws: Quantity and Quality Regulation*, 24 Land & Water L. Rev. 39, 61-62 (1989) (providing examples of the coordination of groundwater and surface water in Wyoming).

The language of the Compact, as well as the general treatment of hydrologically interconnected groundwater under the doctrine of appropriation both at the time the Compact was negotiated and subsequently, demonstrates that the Compact protects pre-1950 uses in Montana from interference by at least some forms of groundwater pumping that date from after January 1, 1950 where the groundwater is hydrologically interconnected to the surface channels of the Yellowstone River and its surface tributaries. The failure of the Compact to specifically use the term "groundwater" is not surprising given both the general understanding at the time that rivers implicitly included at least some hydrologically interconnected groundwater and the fact that the negotiators did not believe that groundwater was likely to be a significant issue in managing the Yellowstone River system. Federal Power Comm'n, Preliminary Report on Yellowstone River Basin, *supra*, at 45, Joint App. at 559 (Dec. 1940) ("it may be assumed that irrigation from underground pumping will not have a significant effect on stream diversions within the calculable future"). Groundwater was not a major issue in the negotiations. The overall language of the Compact, however, reveals a clear intent to protect pre-1950 appropriations from all forms of interference by subsequent water users, including the withdrawal of at least some forms of hydrologically connected groundwater.

The Compact's definition of "diversion" in Article II would appear to provide further support for this conclusion. As discussed above, Article V(B) provides that "diversions for beneficial use on new lands" are to come from "unused and unappropriated" waters, not from waters belonging to pre-1950 appropriators. Article II(G) provides that the term "diversion" means "the *taking* or *removing* of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken" (emphasis added). The United States in its *amicus* brief makes a strong case that the pumping of groundwater that is hydrologically interconnected to the surface channel of a tributary is encompassed by this definition. Brief for the United States as *Amicus Curiae* in Opposition to the Motion to Dismiss, May 2008, pp. 24-26. Such groundwater pumping, by preventing the water from reaching the channel of the tributary, would appear to quite literally "take" or "remove" water from that tributary.

Because the language of Article V(A) of the Compact clearly protects pre-1950 appropriators from at least some forms of harmful groundwater withdrawals, however, it is unnecessary for purposes of resolving Wyoming's motion to determine whether groundwater pumping is included in the term "diversion." The meaning of the term "diversion," which is used in Articles V(B) and V(C) but not Article V(A), has implications for the application of the Compact that go beyond protecting pre-1950 appropriations. While Article V(A) addresses only the protection of pre-1950 appropriations, Articles V(B) and V(C) apportion the waters of the Yellowstone River among post-1950 water users. Deciding whether the term

"diversion" includes groundwater withdrawals is not only unnecessary but could affect the administration of Articles V(B) and V(C) and the rights of post-1950 water users in ways that are unpredictable.

Recognizing the potential implications of a holding that Article V(A) does not protect Montana's pre-1950 uses from withdrawals of interconnected groundwater, Wyoming argues that Montana would not be without any redress. According to Wyoming, Montana could ask Wyoming to negotiate an amendment to the existing Compact, start negotiations with Wyoming for a new compact, or bring an equitable apportionment action in the Supreme Court to apportion groundwater. Wyoming's Reply Brief, *supra*, p. 29. As the preamble to the Compact emphasizes, however, the Compact was designed to avoid additional negotiations and disputes. The Compact was meant to "remove all causes of present and future controversy . . . with respect to the waters of the Yellowstone River and its tributaries" and "provide for an equitable division and apportionment of such waters." Compact, Preamble. Article V(A) does this by protecting pre-1950 appropriations in Montana against all interference by new users, whether by surface or groundwater diversion. Given the purposes of the Compact, "neither the parties to the Compact, nor the Congress and the President who approved it, could have intended that an upstream State could, with impunity, unilaterally enlarge its allocation by taking some of the virgin water supply before it reached the stream flow." First Report of the Special Master, *Kansas v. Nebraska*, No. 126, Orig., p. 21 (Jan. 28, 2000).

The conclusion that Article V(A) covers at least some groundwater withdrawals does not answer the

subsidiary issues of exactly what groundwater is covered or the exact circumstances under which groundwater pumping violates Article V(A). It is not necessary to answer these issues, however, in order to resolve Wyoming's Motion to Dismiss. Because the parties did not brief these issues and because answers to the issues are likely to be fact specific, resolution of the issues is best left for subsequent proceedings in this case.

D. Montana's Specific Allegation of Violations Resulting from Increased Consumption by Pre-1950 Uses in Wyoming

Montana also alleges that pre-1950 appropriators in Wyoming have increased their irrigation efficiency and, as a result, consume more water on lands that were irrigated as of January 1, 1950, reducing the water flowing downstream to Montana and depriving pre-1950 uses in Montana of sufficient water.[*] *See* Complaint ¶ 12. Montana's final allegation highlights the difference between the amount of water diverted for an off-stream use and the amount consumed by that use. Most water users consume only a percentage of the water that they divert. The remainder often flows back into a waterway and is

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[*] After I issued a Memorandum Opinion on Wyoming's Motion to Dismiss in June 2009, I invited the parties to submit letter briefs advising me of any corrections or clarifications that they believed should be made to the opinion. In its letter brief, Montana argued that the opinion had erred in concluding that increases in consumption by pre-1950 appropriators in Wyoming did not violate Montana's rights under the Compact. Both Wyoming and the United States filed letter briefs in response, and Montana filed a reply letter brief. On September 4, 2009, I issued a supplemental opinion confirming my original conclusion and providing an expanded legal analysis.

available for consumption by downstream users. The percentage of water that is consumed is known as "water efficiency." When a water user increases its water efficiency and thus its consumption, the change can reduce the amount of water that flows back into the waterway and is available for downstream water users—even though the amount that is diverted does not increase.

According to Montana, pre-1950 Wyoming appropriators have switched from flood irrigation to sprinkler irrigation, which can significantly reduce return flows to the waterways:

> It is typical for flood irrigation to consume approximately 65% of the water applied to the fields. The other 35% of the water applied flows back to the stream either on the surface or by percolation through the ground. Use of sprinklers, especially with drop nozzles, can increase the efficiency from 65% to 90% or more. This reduces return flows back to the stream from 35% to 10% or less.

Montana's Brief in Support of Leave to File, *supra*, pp. 15-16. Because pre-1950 appropriations in Montana depend on this return flow during periods when the tributaries carry little other flow, Montana alleges that Wyoming farmers' increased consumption reduces the amount of water available to satisfy Montana's pre-1950 uses in violation of Article V of the Compact. Montana's Brief in Response to Wyoming's Motion to Dismiss Bill of Complaint, May 2008, p.47 & n.7 ("Montana's Brief in Response to Motion to Dismiss"); Montana's Letter Brief Re Memorandum Opinion on Motion to Dismiss, July 17, 2009, p. 4 ("Montana's Letter Brief").

This final allegation raises a very different issue than Montana's other allegations do. While the other allegations involve conflicts between pre-1950 uses in Montana and post-1950 uses in Wyoming, this allegation involves a conflict between two sets of pre-1950 uses. As discussed above, Article V(A) protects Montana's pre-1950 uses from post-1950 surface diversions, storage, and groundwater withdrawals in Wyoming. Article V(A)'s mandate is less clear, however, where pre-1950 farmers in Wyoming increase their irrigation efficiency and thus their water consumption without increasing their diversions. Article V(A) provides for the "continued enjoyment" of appropriative rights in both Montana and Wyoming. In Montana's view, the increased consumption is interfering with its pre-1950 appropriative rights in violation of Article V(A). In Wyoming's view, however, its farmers are simply exercising their pre-1950 appropriative rights under the recognition of Article V(A).

The Compact's history cautions against reading the Compact to require any of the signatory states to impose new requirements or procedures for the management of pre-1950 appropriative rights unless the Compact clearly mandates them. While the drafters were intent to protect pre-1950 appropriations from later diversions and withdrawals, they recognized that the signatory states differed in some aspects of their administration of existing rights, and they explicitly declined at several points to create a unitary system for regulating and administering pre-1950 appropriative rights. As discussed earlier, both Congress and the negotiators of the Compact believed that "little could be gained, from a water supply standpoint, by attempting, in the compact, the regulation and administration of *existing* appropri-

ative rights in the signatory states." House Rep. No. 1118, *supra*, at 2, Joint App. at 26 (emphasis added). *See also* Senate Rep. No. 883, *supra*, at 11, Joint App. at 22; October 1950 Meeting Minutes, *supra*, at 6, Joint App. at 60 (noting that the Engineering Committee had concluded that there was "little to be gained from a water supply standpoint by regulating and administering existing diversions under a Compact").

The negotiators saw little benefit and significant difficulty in trying to administer pre-1950 rights under the Compact on an interstate basis, particularly given the differences in water law among the signatory states and the difficulties this would pose for interstate administration. The Engineering Committee discussed the question in its letter of October 23, 1950 to the chair of the Compact Commission:

> Concerning treatment of existing developments in the Compact, the committee is of the opinion that there is little to be gained from a water supply standpoint by regulating and administering existing diversions under a Compact. It is, of course, entirely up to the Commission whether or not existing rights are to be administered under the Compact, but from an engineering standpoint, the committee feels that the expense and difficulties of such an administration would in no way justify the benefits that might be obtained. There are insufficient data upon which to base this type of administration due principally to differences in the water laws of the States involved. It would be a major research project to place existing rights in all States on an equivalent basis. Such procedure undoubtedly would involve interstate adjudication procedures.

Letter from Engineering Committee to Commission Chair R.J. Newell, *supra*, at 1-2, Joint App. at 231-232.

This history does not directly resolve Montana's objection to increased consumption by pre-1950 appropriators in Wyoming. Montana is not seeking the direct "regulation and administration of existing appropriative rights" under the Compact. Montana is arguing neither that the Compact establishes a unitary system for regulating pre-1950 appropriative rights nor that the Compact directly prohibits pre-1950 appropriators from increasing their water consumption. Instead, Montana simply argues that Wyoming must ensure that any increased consumption does not interfere with return flow needed to satisfy Montana's pre-1950 uses. Montana's Letter Brief, *supra*, pp.12-13.

The practical consequences of Montana's argument, however, would raise the types of concerns that led the Compact negotiators not to regulate or administer pre-1950 appropriative rights. Under Montana's argument, Wyoming must either prevent its pre-1950 appropriators from increasing their consumption to the detriment of Montana's pre-1950 uses or make up for the increased consumption through some other means. Any such requirement would at a minimum force Wyoming to determine its appropriators' pre-1950 efficiency levels and then track any changes in that efficiency over time. Because Wyoming would likely find it difficult if not impossible to offset any increased consumption during times of shortage, it would almost certainly lead to additional regulation of Wyoming's pre-1950 appropriators. For these reasons, the Compact's history cautions against

reading requirements into the Compact unless the Compact's intent is clear.

1. The Language of the Compact Does Not Explicitly Limit Consumption Levels of Pre-1950 Appropriators.

In deciding whether increased consumption by pre-1950 appropriators in Wyoming can violate Wyoming's commitments under the Compact, the inquiry begins again with the language of the Compact, specifically Article V(A):

> Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

On its face, the language of Article V(A) would not appear to directly limit the consumptive efficiency of pre-1950 appropriative rights in Wyoming. Focusing on Article V(A)'s reference to "beneficial uses . . . existing . . . as of January 1, 1950," Montana nonetheless argues that this language prohibits Wyoming from "expand[ing] its pre-1950 consumptive water uses by increasing its irrigation efficiency to the detriment of Montana." Montana's Letter Brief, *supra*, pp. 4-5, 13-14. In Montana's view, an increase in consumption is an increase in "beneficial use" and thus not permitted by Article V(A). Beneficial use is central to the concept of prior appropriation and determines not only the legitimacy of an appropriation but also the measure and limit of an appropriative right. *See, e.g., Bailey v. Tintinger*, 122 P. 575, 580 (Mont. 1912) (putting water to a beneficial use is the essence of an appropriation); Wyo.

Stat. Ann. § 41-3-101 (beneficial use is the "basis, the measure and limit" of an appropriative right).

The language of Article V(A), however, establishes only the amount of water that can be diverted, not consumed, by pre-1950 uses in Wyoming. Article V(A) provides for the continued enjoyment of "[a]ppropriative rights to the beneficial uses" of water existing as of 1950. Prior-appropriation states have generally measured appropriative rights by the amount of water diverted from the waterway and put to a beneficial purpose, not the amount consumed. So long as the water diverted is put to a valuable use and not wasted (*i.e.*, is "beneficially used"), the entire amount diverted is the measure of the appropriative right. *See* 1 Samuel C. Wiel, Water Rights in the Western States, *supra*, § 478, at 502 (appropriator is entitled to the quantity of water actually diverted and used for a beneficial purpose). Article V(A) thus would appear to preclude the enlargement of pre-1950 diversions but does not speak directly to increases in efficiency.

If the drafters of the Compact had intended to limit the amount of water that could be consumed under pre-1950 rights in Wyoming, they enjoyed far clearer and more explicit ways to do so. Article V(A), for example, could have provided for the continued enjoyment of only "the amount of water *consumed* for a beneficial use in each signatory state as of January 1, 1950." *See, e.g.*, Wyo. Stat. § 41-3-104(a) (appropriator can transfer water to a new use or place of use provided that the transfer does not "increase the historic amount *consumptively used* under the existing use" (emphasis added)). Instead, Article V(A) provides for the continued enjoyment of "appropriative rights to . . . beneficial uses."

Montana notes that Article II(H) defines "beneficial use" under the Compact as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Montana argues that this language demonstrates an intent to "quantifly] existing uses in terms of depletion"—*i.e.*, consumption, not diversion. Montana's Letter Brief, *supra*, p. 13; Montana's Reply to the Letter Briefs of Wyoming and the United States, Aug. 3, 2009, p. 2. Article II(H), however, does not define "beneficial use" as the *amount* of water depleted or consumed. Instead, Article II(H) merely provides that a "beneficial use" is a use that depletes the water supply of a basin. In requiring that a "beneficial use" deplete a waterway, Article II(H) echoes the traditional requirement of prior-appropriation law that appropriations actually divert water from a stream for consumptive use. *See* 2 Waters and Water Rights, *supra*, § 12.02(c)(1), at 12-9 to 12-22.

Read in the context of western appropriation law, the beneficial-use language in Article V(A) addresses the *types* of uses that the Compact protects, not the right of a pre-1950 appropriator to increase his or her efficiency. The principal purpose of the "beneficial use" doctrine in prior appropriation law is to ensure that water is appropriated and used for only valuable purposes and is not wasted. *See id.* § 12.02(c)(2), at 12-22 to 12-41. Reflecting this purpose, Article II(H) defines "beneficial use" as a use that depletes a drainage basin "when usefully employed by the activities of man." The Compact's language says nothing one way or the other regarding the right of a pre-1950 Wyoming appropriator to increase the efficiency or intensity of his or her "beneficial use" subsequent to the passage of the Compact.

Montana suggests that any post-1950 increases in consumption by a pre-1950 appropriator fall under Article V(B), which apportions the "*unused* and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950" (emphasis added), rather than Article V(A). If true, increases in consumption would be subordinate to the pre-1950 appropriative rights protected under Article V(A). Article V(B), however, governs "unused" not "unconsumed" waters. In normal parlance, water that is diverted from a river for a beneficial purpose is "used" even if it is not fully "consumed." The language of Article V(B) thus does not suggest that increases in consumption by pre-1950 appropriators fall under its provisions rather than those of Article V(A).[10]

Montana also argues that, if the Compact is interpreted to permit pre-1950 appropriators to increase their water consumption under Article V(A), the interpretation would render superfluous the provi-

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[10] By apportioning the "*unused* and unappropriated waters" in Article V(B), the drafters may have intended to address the problem of unexercised appropriative rights (what are sometimes known as paper rights). Paper rights are a significant problem in the western United States because they can deter new appropriations of unused water. *See, e.g.*, Michael McIntyre, *The Disparity Between State Water Rights Records and Actual Water Use Patterns: "I Wonder Where the Water Went?,"* 5 Land & Water L. Rev. 23 (1970) (noting that there are often significant differences between the water rights recorded in state water agencies and the water actually used). *Cf. Kansas v. Colorado*, 514 U.S. 673, 690 (1995) (holding that, under the Arkansas River Compact, Colorado pumpers cannot increase their pumping beyond pre-compact levels). Under the language of Article V, any attempt to use rights that existed only "on paper" as of January 1, 1950, would seem to fall under Article V(B) rather than V(A).

sion for "supplemental water supplies" in Article V(B). *See* Montana's Brief in Response to Motion to Dismiss, *supra*, p. 49. As noted earlier, Article V of the Compact establishes a three-tier hierarchy of rights: (1) pre-1950 appropriative rights, (2) "supplemental water supplies" for pre-1950 appropriators, and (3) other new appropriative rights. In Montana's view, the provision for "supplemental water supplies" covers exactly the type of consumption increases to which Montana objects. According to Montana, allowing pre-1950 Wyoming users to increase consumption under Article V(A) destroys the Compact's hierarchy and makes unnecessary the portion of Article V(B) providing for "supplemental water supplies."

When a pre-1950 appropriator needs additional water for use on existing irrigated acreage, however, the appropriator has at least two potential means of obtaining the water. The appropriator can increase his efficiency, stretching his existing water supply sufficiently to meet his unmet needs, or the appropriator can divert more water. Article V(A) does not allow increased diversions, so an appropriator wishing to go this latter route must avail himself of the provision for "supplemental water supplies" in Article V(B). Thus, if Article V(A) permits increased consumption of existing diversions, the provision for "supplemental supplies" still has independent meaning and significance. Article V(B), moreover, refers not to "supplemental water" but to "supplemental water *supplies*" (emphasis added), suggesting that the provision refers to new diversions of water rather than to merely a more "efficient" and thus consumptive use of *existing* water supplies. Improved water efficiency merely stretches existing water supplies and does not produce new supplies.

In determining whether the Compact restricts pre-1950 Wyoming appropriators to the amounts of water that they were *consuming* rather than *diverting* as of January 1, 1950, it is informative that, in deciding how to allocate unused and unappropriated water under Article V(B) of the Compact, the negotiators decided to apportion water on the basis of "divertible flow" rather than consumptive use. The earliest drafts of the Compact provided for apportionment of divertible flow. *See, e.g.*, Burke Draft, *supra*, at 10, Joint App. at 135. In late 1950, however, the chairman of the Engineering Committee submitted a proposal that would have apportioned water instead on the basis of annual "consumptive use." *See* Myers Draft, *supra*, at 9, Joint App. at 206; October 1950 Meeting Minutes, *supra*, at 13, Joint App. at 67. The Engineering Committee's draft of the Compact and the final Compact rejected this approach and returned to the original system of allocating waters based on divertible flow. *See* Engineering Committee Draft, *supra*, at 11, Joint App. at 173. According to Congress, the negotiators chose a divertible-flow approach because it "had been used in earlier negotiations and was more familiar to the commissioners." Senate Rep. No. 883, *supra*, at 7, Joint App.18.

2. Do Consumptive Limits Follow from Article V(A)'s Incorporation of the Doctrine of Appropriation?

The absence of explicit language limiting the consumption of pre-1950 appropriators, by itself, does not demonstrate that the Compact allows pre-1950 appropriators in Wyoming to increase their efficiency and consumption to the detriment of Montana's pre-1950 uses. Article V(A) of the Compact provides for the continued enjoyment of pre-1950 appropriative

rights in both Montana and Wyoming, but only "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." If prior-appropriation law clearly proscribe increases in consumption on existing acreage to the detriment of downstream appropriators, the Compact arguably would prohibit Wyoming from allowing its appropriators to make such increases to the detriment of Montana's pre-1950 uses.

Unfortunately, whether and under what circumstances an appropriator can increase consumption to the detriment of downstream appropriators is not one of the clearer areas of prior-appropriation law. According to the late Dean Frank Trelease, "Perhaps no area of the doctrine of prior appropriation is so confused as is the law pertaining to seepage or return flows." Frank J. Trelease, *Reclamation Water Rights*, 32 Rocky Mtn. L. Rev. 464, 469 (1960). The law in some states, for example, can depend on whether a court decides that previously unconsumed water was "seepage water," "waste water," "surplus water," or "return flow," yet courts seldom define these terms or explain why they should matter. Adding to the confusion, different courts often use these terms in different ways and attach different consequences to the resulting classifications.

No western state court appears to have conclusively answered the question posed by this case—viz., can (1) an agricultural appropriator, (2) increase his or her consumption of water, (3) on the same irrigated acreage to which the appropriative right attaches, (4) to the detriment of downstream appropriators, (5) in the same water system from which the water was originally withdrawn? Although Montana observes that it is "not aware of a single case in any

jurisdiction in which a court allowed a senior appropriator to increase efficiency and thereby decrease historic return flows to a fully appropriated natural watercourse" (Montana's Letter Brief, *supra*, p. 8), none of the parties or *amici* in this case has cited a case to the contrary either. Despite significant independent research, I also have been unable to find a case that is on all fours with the question posed here. As explained below, however, Wyoming Supreme Court decisions both before and after the Compact was negotiated strongly indicate that Wyoming law permits appropriators to increase consumption on existing acreage through improved irrigation techniques. No Montana case or statute would appear to contradict this rule. As a result, Article V(A) should not be read to require Wyoming to forbid or remedy such increased consumption in this case.

3. *General Principles of Appropriation Law Regarding Changes in Water Uses*

In order to better understand Wyoming and Montana law, it is useful to look first at the general prior-appropriation principles regarding changes in water uses. The prior appropriation doctrine has long protected downstream appropriators from formal changes in upstream water rights that reduce return flow to the waterway and thereby reduce the amount of water available to the downstream appropriators. Although the law has long permitted and even encouraged changes in water rights, states have sought to protect the interest of downstream appropriators who have grown reliant on the return flow from the existing uses. Writing at approximately the same time as the Compact, the Colorado Supreme Court noted the "well established" principle that "junior appropriators have vested rights in the

continuation of stream conditions as they existed at the time of their respective appropriations" and can therefore complain of "all proposed changes in points of diversion and use of water from that source which in any way materially injures or adversely affects their rights." *Farmers Highline Canal v. Golden*, 272 P.2d 629, 631-632 (Colo. 1954). Every western state therefore prohibits appropriators from changing the purpose or place of their water use, or the point from which they divert the water, if that change would injure downstream appropriators by decreasing return flows upon which they rely. Statutes in both Montana and Wyoming codify this rule. *See, e.g.*, Mont. Code Ann. § 85-2-402; Wyo. Stat. Ann. § 41-3-104.

This "no injury" rule, however, is not inviolable. Western states have adopted several exceptions to the rule where they have concluded that the benefits of allowing a change outweigh the cost to downstream appropriators. A number of states, for example, permit cities to change or reduce the discharge of sewage effluent even though downstream appropriators have been using the effluent and grown reliant on its discharge. In *Arizona Public Service Co. v. Long*, 773 P.2d 988 (Ariz. 1989), two cities that had long discharged treated sewage effluent into the Salt River, where it was appropriated and used by downstream appropriators, sought instead to purify and sell the sewage effluent to several electric utilities as cooling water. The court held that this was permissible even though it would reduce the water available to the downstream appropriators. According to the court, downstream water users can appropriate sewage water that a city voluntarily permits to return to a stream, but cannot insist on its continued discharge. Two policy considerations influenced the

court's decision: (1) the importance of allowing cities to dispose of sewage effluent in an efficient and environmentally sound fashion, and of more direct relevance to this case, (2) the need to avoid waste. According to the Arizona Supreme Court,

> No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator, through scientific and technical advances, can utilize his water so that none is wasted, no other appropriator can complain. *See Reynolds v. City of Roswell*, 99 N.M. 84, 654 P.2d 537 (1982); *Bower v. Big Horn Canal Association*, 77 Wyo. 80, 307 P.2d 593 (1957). The junior appropriator, using waste water, "takes his chance" on continued flow. *Thayer v. Rawlins*, 594 P.2d 951 (Wyo. 1979). To hold otherwise and require the Cities to continue to discharge effluent would deprive the Cities of their ability to dispose of effluent in the most economically and environmentally sound manner .... Moreover, such a holding would be contrary to the spirit and purpose of Arizona water law, which is to promote the beneficial use of water and to eliminate waste of this precious resource. ....

Id. at 996-997. *See also Metropolitan Denver Sewage Disposal Dist. v. Farmers Reservoir & Irrig. Co.*, 499 P.2d 1190 (Colo. 1972) (city can change point of return of sewage effluent even if it injures downstream appropriators).[11]

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[11] Other exceptions also exist to the "no injury" rule for changes in water rights. Some courts, for example, allow water users who import water from foreign watersheds to increase their consumption of that water even to the detriment of other appropriators who have grown reliant on return flow. *See, e.g.*,

The cases and statutes protecting downstream appropriators from formal changes in water rights, moreover, are not directly applicable to Montana's Complaint. In the present case, Montana alleges that pre-1950 Wyoming appropriators are using irrigation improvements to increase water consumption on the *same acreage* and for the *same use* as before. Montana has not alleged that the Wyoming appropriators are changing their place of use, point of diversion, or type of use (at least as the term "use" is employed in change-of-use statutes). The normal events that trigger the "no injury" rule are thus not applicable to this case.

Practical considerations also differentiate this case from those situations where states normally impose a "no injury" rule. States do not generally have procedures for overseeing changes in water efficiencies stemming from crop shifts or irrigation improvements where there are no formal changes in the underlying water rights. Before appropriators change their place or type of use or change their point of diversion, most states require them to apply for state approval—giving the states an opportunity to evaluate, among other factors, whether a change would reduce return flow to, and thus injure, other appropriators. Reflecting the difference between these changes and mere increases in efficiency or consumption on existing acreage, state change procedures do not typically apply to changes only in crops or irrigation techniques.[12] Neither Montana nor

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Stevens v. Oakdale Irrigation Dist., 90 P.2d 58 (Cal. 1939); *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 74 (Colo. 1996).

[12] This does not mean that there is no way to challenge increases in efficiency. Downstream water users, for example, could sue to enjoin an upstream appropriator from increasing

Wyoming, for example, applies its change procedures to such actions. In order to effectively oversee shifts in efficiency or consumption that do not involve changes in place or type of use or point of diversion, Wyoming would thus need to extend existing procedures to all changes in water use that could materially impact efficiency or develop a new oversight system for such changes. Irrigators would need to seek state approval whenever they shifted to more water-intensive crops or changed their irrigation equipment or practices.

Historically, appropriators could not take water that they did not need on the land to which a water right attached and use it on *different* land. Under the traditional doctrine of prior appropriation, any unneeded water had to return to the waterway for use by others. For this reason, appropriators could not save water by improving their irrigation practices and then either sell that water to another user or use the water on other land they owned. In *Salt River Valley Water Users' Ass'n v. Kovacovich*, 411 P.2d 201 (Ariz. App. 1966), for example, an appropriator saved water by lining and improving its ditches and then sought to use the saved water on adjacent land. The Arizona Court of Appeals held that this violated the "beneficial use" rule because the appropriator, having improved its ditches, no longer needed the saved

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consumption or to force the upstream appropriator to replace the lost runoff. *See, e.g., Estate of Paul Steed v. New Escalante Irrigation Co.*, 846 P.2d 1223 (Utah 1992) (downstream appropriator brought lawsuit to force an upstream appropriator to replace lost runoff). To ensure that pre-1950 Wyoming appropriators were not increasing efficiency and consumption in violation of the Compact, however, Wyoming would need to establish regular state oversight of the farmer's crop and irrigation practices.

water to irrigate crops on the land to which the appropriative right attached. Because the saved water was no longer needed for a beneficial use on the appurtenant land, the saved water had to return to the stream "to the benefit of other water users." Id. at 204. Because this rule can discourage useful conservation, Montana and several other states have adopted statutes in recent decades allowing appropriators to keep and use conserved water in at least some situations on other land. *See, e.g.*, Cal. Water Code § 1011; Mont. Code Ann. § 85-2-419; Or. Rev. Stat. §§ 537.455 to 537.500.

Montana's allegations, however, also do not trigger the beneficial use doctrine because according to Montana, Wyoming appropriators are not seeking to take unneeded water and use it elsewhere as in *Kovacovich*. Instead, Wyoming appropriators are seeking to make increased, more efficient use of water on the very acreage to which their rights attach. All of the water is therefore still being put to a "beneficial use." Water uses generally raise concerns under the beneficial-use doctrine when they are *inefficient*, not *efficient*.

A number of cases have discussed the capture and reuse of water that is left over after appropriators irrigate or otherwise use water on their land. Courts have used a variety of labels to describe this water. Depending on the context, courts have called this water "seepage," "waste," "wastage," "run-off," "percolation," and various other terms. The use of this terminology, unfortunately, often differs among courts and even among cases in the same jurisdiction, so that too much weight cannot be placed on the particular terminology used in any case. The law on the capture and reuse of water also differs more

among states than do the "no injury" rule or the beneficial-use doctrine, dictating caution in generalizing from the law of any particular state.

One line of cases deals with the right of property owners to appropriate what is often labeled "seepage" water—vagrant water that runs or diffuses across a property owner's land after being used for irrigation or other purposes on neighboring land. In many states, property owners cannot appropriate such "seepage" water while the water remains vagrant and diffuse.[13] *See, e.g., Thompson v. Bingham*, 302 P.2d 948, 949 (Idaho 1956). Although property owners can generally capture and use such water as it crosses their properties, they cannot demand that the original appropriator continue the seepage. *See, e.g., id.* at 949-950; *Crawford v. Inglin*, 258 P. 541, 543 (Idaho 1927); *Garns v. Rollins*, 125 P. 867, 872 (Utah 1912). As a result, the original appropriator is always free to recapture the water and apply it to a beneficial use. *See, e.g., Thompson v. Bingham, supra*, 302 P.2d at 949; *Crawford v. Inglin, supra*, 158 P. at 543; *Garns v. Rollins, supra*, 125 P. at 872. According to the United States Supreme Court, "Considerations of both public policy and natural justice strongly support" the rule that an appropriator has a right to capture and reuse their own waste water "from surface run-off and deep percolation, necessarily incident to practical irrigation." *Ide v. United*

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[13] However, once such "seepage" water makes it to a natural waterway (or, in some states, even to a confined canal), most states permit water users to divert and appropriate the water from the waterway. *See, e.g., Sebern v. Moore*, 258 P. 176, 178 (Idaho 1927) (canal); *McNaughton v. Eaton*, 242 P.2d 570, 574 (Utah 1952) (waterway).

States, 263 U.S. 497, 506 (1924), quoting *United States v. Haga*, 276 F. 41, 43 (D. Idaho 1921).

A second and partially overlapping line of cases holds that appropriators can capture and reuse waste water while the water is still on their property. As the Oregon Supreme Court has written,

> an appropriator is justified in recapturing waste water remaining upon his land and in applying it to a beneficial use. In fact it is said that water "is not waste water so long as it remains upon the land of the original appropriator." It would seem that an appropriator should be commended for recapturing water that has already been used by himself and applying it again in a beneficial manner.

Barker v. Sonner, 209 P. 1053, 1054 (Or. 1931), quoting Long on Irrigation 89 (2d ed.). *See also McNaughton v. Eaton*, 242 P.2d 570, 574 (Utah 1952). While some of these cases involve diffused water, others do not. *See, e.g., id.* As a corollary to the basic rule, the cases also hold that an appropriator cannot capture and reuse such water after the water has flowed into a natural waterway; water must be captured on the land where it is originally used, not from a natural waterway.

If appropriators can capture and reuse waste water while it is still on their land, it would seem to follow that appropriators have a right to reduce or eliminate the return flows entirely by increasing irrigation efficiency, lining canals, and similar actions. In *Hidden Springs Trout Ranch, Inc. v. Hagerman Water Users, Inc.*, 619 P.2d 1130 (Idaho 1980), the Hagerman Water Users ("Hagerman") had long tried to reduce leakage from a ditch they used to transport water for

use on their land. The leaking water formed a spring, from which the Hidden Springs Trout Ranch had long diverted water. When Hagerman succeeded in reducing the leakage by replacing the ditch with a steel pipe, the Hidden Springs Trout Ranch objected. Citing *Bower v. Big Horn Canal Assoc.*, 307 P.2d 593 (Wyo. 1957), the court held that no distinction should be made "between waste water appropriated after it has been put to irrigation use and waste water seeping from irrigation canals." 619 P.2d at 1133. "No appropriator of waste water should be able to compel any other appropriator to continue the waste of water which benefits the former." *Id.* at 1134. A rule allowing downstream appropriators to "enforce the continuation of waste will not result in more efficient uses of water." *Id.* As a result, an appropriator is free to "reclaim" reasonable seepage, "for instance, by improving his transmission system." *Id.*

None of these cases, however, involved an appropriator who increased his efficiency and consumption to the detriment of downstream appropriators *on the same waterway from which the water was diverted*. For this reason, they are not on all fours with Montana's allegation in this case. The Utah Supreme Court has addressed the issue, but only in passing and inconclusively. In *East Bench Irrigation Co. v. Deseret Irrigation Co.*, 271 P.2d 449 (Utah 1954), 23 different irrigators on the south fork of the Sevier River sought to change the place of diversion and type of use for their waters over the objection of downstream appropriators reliant on the return flow. The water users argued that it should not matter that the changes would reduce return flow because the water users could "legally increase the quantity of water consumed in irrigating their lands by changing to more water consuming crops, by applying

more water on their presently irrigated lands and by bringing under cultivation presently irrigated and even non-irrigated pasture lands"—all to the same effect on return flow. *Id.* at 455. The Utah Supreme Court disagreed because, as a matter of both common law and statute in Utah, appropriators cannot change their points of diversion or places of use to the impairment of other appropriators' rights. *Id.* The court, however, "assum[ed] without conceding" that the irrigators could increase consumption on their existing acreage. *Id.* According to the court, "it would be difficult to prevent plaintiffs from making such increased consumptive use of this water." *Id.* The plaintiffs "could increase the amount of water consumed by changing the kind of crops, the manner of use and intensity of irrigation . . . under conditions which require no application for a change." *Id.*

In *Estate of Paul Steed v. New Escalante Irrigation Co.*, 846 P.2d 1223 (Utah 1992), the New Escalante Irrigation Company switched from flood irrigation to sprinklers, reducing runoff on which a downstream appropriator relied. The Utah Supreme Court held that the New Escalante Irrigation Company had the right to do so even over the objections of the downstream appropriator. The court relied on prior cases holding that a "reappropriator acquire[s] no rights as against the original appropriator to have the waste water continue" and that an appropriator can capture and reuse waste waters "if he does so before they get beyond his property and control." *Id.* at 1225-1226. According to the court, "efficient and beneficial use of water should be encouraged. In furtherance of that objective, an appropriator should be encouraged to apply water in the most efficient manner." *Id.* at 1229.

Because the case did not involve return flow to the same waterway from which the water was diverted, *Estate of Paul Steed* is again not authority for concluding that pre-1950 appropriators in Wyoming can increase their consumption in this case to the detriment of Montana's pre-1950 water uses. New Escalante diverted water from the Escalante River, but New Escalante's runoff flowed into Alvey Wash, a natural watershed to which the Escalante River did not directly contribute water. *Id.* at 1223-1224. In fact, the Utah Supreme Court stated that the "rule that the upstream irrigator [has] the right to completely consume all the water it diverted, by using it over and over again," does not apply "when the runoff or waste water return[s] to the stream from which it was originally diverted." *Id.* at 1225. Where runoff or waste water reaches and reenters a stream system from which it was diverted, water "becomes a part of that watercourse in legal contemplation as well as physically, and from the standpoint of rights of use, it is just as much a part of the flow as is the water with which it is mingled." *Id.*, quoting Wells A. Hutchins, Selected Problems on the Law of Water Rights in the West 362-368 (1942). In support of this distinction, however, the court cited *East Bench Irrigation Co.*, which as just described, "assume[d] without conceding" that irrigators could increase consumption on their existing acreage by, for example, switching to more water-intensive crops or applying more water.[14]

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[14] In its original context, moreover, the quote from Wells Hutchins seems to address the question of whether waste water can be recaptured after it has returned to a natural waterway rather than the right of a water user to increase consumption on the land that he or she irrigates.

The case law outside Montana and Wyoming is ultimately inconclusive as to whether appropriators can improve their irrigation efficiency and increase consumption on existing acreage to the detriment of downstream appropriators reliant on historic levels of return flow. As discussed, the language and logic of many cases are supportive of increases in efficiency. The lack of any procedure to oversee changes in efficiency also suggests that prior-appropriation law does not proscribe increases in efficiency. At the same time, however, no case directly addresses the facts presented by Montana's Complaint, and language in *Estate of Paul Steed* could be read as proscribing such increases where water both is diverted and returns to the same stream.

The only legal commentary that I have found explicitly addressing the question of whether an irrigator can switch to a more efficient irrigation system concludes that such a switch is legal even if it reduces downstream flows to other appropriators. *See* David H. Getches, Water Law in a Nut Shell 144 (2009). Dean Getches begins by stating that waters "originating within the watershed generally can be recaptured and reused by an appropriator if: (1) the total used does not exceed rights under a permit or decree; and (2) the recapture and reuse occur within the land for which the appropriation was made." *Id.* at 139. Dean Getches then discusses what happens if recapture and reuse leads to more water consumed:

> For instance, if a water user is consuming less than the permitted amount of water and plants a more water-intensive crop or puts in a more efficient irrigation system, most or all of the water that had previously been returned to the stream might be consumed. This can deprive other

> appropriators of water on which they depend *but it is allowed since it is technically within the terms of the original appropriation.*

Id. at 144 (emphasis added).

4. The Law of Wyoming and Montana.

This brings us to the laws of Wyoming and Montana which, as discussed earlier, are the laws of most relevance in interpreting the Compact. The Wyoming Supreme Court has addressed the right of an appropriator to reduce its waste of water in at least three cases, one of which was decided prior to the negotiation of the Compact. In *Binning v. Miller*, 102 P.2d 54 (Wyo. 1940), Charles Bayer was diverting water from a swale, "Spring Gulch Creek," that collected runoff from irrigation by Burleigh Binning. When Binning sought to block the runoff before it reached the swale, Bayer objected. Bayer claimed the right to take the water pursuant to both a disputed 1906 appropriation of the water by George M. Glover, a predecessor in interest, and a 1936 "correction of the adjudicated right" by the Wyoming Board of Control. Looking first at the 1906 appropriation, the Wyoming Supreme Court held that, because Spring Gulch Creek was not at that time a natural stream, Glover did not have a right to appropriate the "seepage and waste water." *Id.* at 59. According to the Wyoming court, the authorities seemed to "agree that the lower owner using such water merely takes his chances that the supply will be kept up; that he has no right thereto, no matter how long he may have used it." *Id.* at 60.

The court found, however, that by 1936 Spring Gulch Creek had become a natural stream, "with very definite channels and banks and so forth." *Id.* at

63. As a result, the "water running in the stream," including the runoff from Binning's irrigation, was "subject to appropriation." *Id.* Bayer therefore had a right to the runoff. *Id.* However, even though the runoff was now flowing into a natural stream and Bayer had a right to appropriate it, the court held that Binning could still capture and reuse the runoff on his land. "In view of the uncertainty of the future, the right of [Bayer] should be made subject to the usual rights of landowners, namely, the right of Binning and his successors in interest to use the water above mentioned for beneficial purposes upon the land for which the seepage water was appropriated, should such beneficial purpose be possible." *Id.*

Six years after the Compact went into effect, the Wyoming Supreme Court had occasion again to address rights to runoff from irrigation operations. In *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593 (Wyo. 1957), water seeped from the Big Horn Canal toward the Big Horn River, passing across Ray Bower's property. When Bower sought to capture and use this runoff on his property before it reached the river, the Big Horn Canal Association objected, urging that Bower had no right to appropriate its "seepage water." The Wyoming Supreme Court disagreed. *Binning* had held that "seepage water which, if not intercepted, would naturally reach a stream is just as much a part of the stream as the water of any tributary" and is appropriable. *Id.* at 602. Bower did not have to wait until the water reached the river to appropriate it.

Of direct relevance to this case, the Wyoming Supreme Court went on to hold that "any rights [Bower] secured thereby" were "subject, of course, to

the right of [the Big Horn Canal Association] to terminate that source of the supply which seeps directly from [its] canal." *Id.* According to the court,

> No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator by a different method of irrigation can so utilize his water that it is all consumed in transpiration and consumptive use and no waste water returns by seepage or percolaton [sic] to the river, *no other appropriator can complain.*

Id. at 601 (emphasis added).

The Wyoming Supreme Court again addressed rights to "seepage or waste water" in *Fuss v. Franks*, 610 P.2d 17 (Wyo. 1980). *Fuss* dealt with water that ran off the irrigation property of several landowners (the "appellants") into a highway borrow pit. One of the appellants sought to convey the water from the borrow pit for use on other lands that he leased and farmed, but Franks diverted the water first for use on his land. *Id.* at 18-19. Because this water "would, if uninterrupted, flow into a natural stream," the court held that Franks could appropriate the water. *Id.* at 19-20. Of most importance to this case, the Wyoming Supreme Court confirmed again that "the owner of land upon which seepage or waste water rises has the right to use and reuse—capture and recapture—such waste waters," but "for use only 'upon the land for which the water forming the seepage was originally appropriated.'" *Id.* at 20, quoting *Binning*. Because the appellants in *Fuss* sought to recapture the water after it had left their land and for use on other property, they had no "superior right to such water." *Id.* Waters "become appurtenant to the lands for which they are acquired," and "unless the statutes

are followed with respect to change of use, the waters cannot be detached and assigned to *other* land without the loss of priority." *Id.* (emphasis added).

Binning, *Bower*, and *Fuss* therefore all appear to hold that an appropriator in Wyoming can increase his water use efficiency by recovering runoff on his property or through other means so long as the increased consumption is on the same land to which the appropriative right attaches. Montana argues that *Binning* and *Bower* are irrelevant to this case because they involve "seepage" or "waste" water and are an exception to general rules regarding runoff. As explained above, however, both of the Wyoming cases involved runoff from agricultural land that, in *Binning*, had actually become part of a natural stream (albeit a stream made up primarily if not entirely of agricultural runoff) and, in *Bower*, would have naturally reached a stream (and thus was "just as much a part of the stream as the water of any tributary"). The language of the Wyoming Supreme Court, moreover, was expansive in all three cases. In each case, the court held explicitly that appropriators have a right to reduce waste even to the detriment of other appropriators who have become reliant on the runoff. *Binning*, 102 P.2d at 60; *Bower*, 307 P.2d at 601-602; *Fuss*, 610 P.2d at 20.

Nothing in the Wyoming Supreme Court's language suggests that the announced rule would not apply to the facts presented by Montana's Complaint. Although the Wyoming Supreme Court might distinguish a future case in which runoff flows to the same waterway from which water is originally appropriated, the language and logic of *Binning*, *Bower*, and *Fuss* strongly suggest that the court would reach the same result in such a case. It is

informative that other courts have read *Binning* and its progeny to speak broadly to the right of an appropriator to eliminate water waste even to the detriment of downstream appropriators. *See, e.g.*, *Arizona Public Service Co., supra*, 773 P.2d at 996-997 (holding that cities can cease the discharge of sewage effluent to a natural waterway) (discussed *supra* at pp. 67-68); *Hidden Springs Trout Ranch, supra*, 619 P.2d at 1133 (noting that no distinction should be made "between waste water appropriated after it has been put to beneficial use and waste water seeping from irrigation canals") (discussed *supra* at pp. 73-74).[17]

No opinion of the Montana Supreme Court speaks as directly as *Binning*, *Bower*, and *Fuss* to the right of appropriators to increase their irrigation efficiency and amount of water consumption. The Montana Supreme Court, like other western courts, has long held that appropriators cannot change their place or type of use if that would modify return flow to the detriment of downstream appropriators. *See, e.g.*, *Cate v. Hargrave*, 680 P.2d 952 (Mont. 1984) (change in use); *Whitcomb v. Helena Water Works Co.*, 444 P.2d 301, 304 (Mont. 1968) (change in storage);

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[17] Illustrating the potential for confusion in this area, the water-law casebook of which I am a co-author excerpts part of *Bower* in its section on "seepage appropriators" and states that "seepage cases are an exception to the usual rule" that a "senior's right is limited to the amount he originally beneficially applied and consumptively used on his land, that is, the amount received at his point of use, minus the runoff." Joseph L. Sax et al., Legal Control of Water Resources: Cases and Materials 197 (4th ed. 2006). As discussed above, however, *Bower* would actually appear to speak to all situations where an appropriator reduces waste and thereby increases consumption on the land to which the appropriative right attaches.

Quigley v. McIntosh, 103 P.2d 1067, 1072 (Mont. 1939) (expansion of use to new lands); *Mannix & Wilson v. Thrasher*, 26 P.2d 373, 374-375 (Mont. 1933) (change in place and manner of use); *Featherman v. Hennessy*, 115 P. 983, 986 (Mont. 1911) (change in use) As the Montana Supreme Court stated over a century ago, "each subsequent appropriator is entitled to have the water flow in the same manner as when he located." *Spokane Ranch & Water Co. v. Beatty*, 96 P. 727, 731 (1908). The Montana Supreme Court has also held that water users are not entitled to divert from a stream more water than they need for use on the land to which their right attaches. *See, e.g., Whitcomb, supra*, 444 P.2d at 303-304; *Conrow v. Huffine*, 138 P. 1094, 1096 (Mont. 1914). As explained earlier, however, such cases do not resolve the issue in this case because Montana does not allege that Wyoming appropriators are attempting to change their place or purpose of use or are using more water than they can put to a beneficial use on their existing acreage.

On the subject of "seepage water," the Montana Supreme Court has held that no one can appropriate such water if it is vagrant and diffuse and that those who capture such water cannot insist on the continued flow of such water. *See Popham v. Holloron*, 275 P. 1099, 1102 (Mont. 1929). Seepage waters are a "proper subject of appropriation" when they reach a watercourse—or even a drainage ditch beyond the control of the original appropriator. *Id.* at 1102-1103. *See also Wills v. Morris*, 50 P.2d 862, 870-871 (Mont. 1935); *Rock Creek Ditch & Flume Co. v. Miller*, 17 P.2d 1074, 1077 (Mont. 1933). These cases, however, do not directly address the question of whether the original appropriator can reduce wastage that is subsequently appropriated downstream.

Once runoff reaches a natural waterway, opinions of the Montana Supreme Court state that the original appropriator can no longer recapture that water. *See, e.g., Rock Creek Ditch & Flume Co., supra*, 17 P.2d at 1077. These cases, however, appear to address the issue of *where* water can be recaptured, not whether appropriators can increase their consumption by eliminating waste. As the Montana Supreme Court noted in *Rock Creek Ditch & Flume Co.*, when water flows from the property of an appropriator, that water is abandoned; this is "not an abandonment of a water right, but an abandonment of specific portions of water, viz., the very particles that are discharged or have escaped from control." 17 P.2d at 1077, quoting Samuel C. Wiel, Water Rights in the Western States § 37 (3d ed. 1911). An appropriator can collect or recapture runoff "*before it leaves his possession*, but, after it gets beyond his control it . . . becomes waste and is subject to appropriation by another." *Id.* at 1080 (emphasis added).

Montana case law is ultimately inconclusive on the key question of whether an appropriator can consume more on existing acreage by switching from flood to sprinkler irrigation. Montana statutory law is no more accommodating. In 1991, Montana passed a "Salvaged Water" statute that declares the policy of Montana to "encourage the conservation and full use of water." Mont. Code Ann. § 85-2-419. The statute permits appropriators to "salvage" water and "retain the right to the salvaged water for beneficial use." *Id.* Salvage is defined as making "water available for beneficial use from an existing valid appropriation through application of water-saving methods." *Id.* § 85-2-102(20). The appropriator must seek approval from the Department of Natural Resources and

Conservation only if it seeks to use the salvaged water for a new use or in a different location. *Id.* § 85-2-419. The statute "encourages water rights holders to take steps to save water by improving their efficiency. As an incentive, the statute authorizes water rights holders to retain and use water saved, rather than having it simply revert back to the stream for further appropriation." *In re Applications for Change of Appropriation of Water by Smith Farms, Inc.*, 1999 Mont. Dist. LEXIS 433 (Mont. Dist. Ct. 1999).

At first glance, improved irrigation efficiency would appear to fit within the Salvaged Water statute. By switching to sprinklers (the "application of water-saving methods"), appropriators make "water available for beneficial use" on their properties. Montana, however, urges that the statute applies only where an appropriator frees up water that otherwise would be unavailable for *anyone's* use. If someone downstream is using runoff from a field employing flood irrigation, a switch to sprinkler irrigation would not "make water available" under Montana's interpretation of the term "salvage." In support of this interpretation, Montana notes that appropriation states have often defined "salvaged water" as "parts of a particular stream or other water supply that have been lost, as far as any beneficial use is concerned, to any of the established users, but are saved from further loss from the supply by artificial means and so are made available for use." 2 Wells A. Hutchins, Water Rights Laws in the Nineteen Western States 565 (1971). For the reasons discussed below, it ultimately is unnecessary to determine the correct meaning of Montana's Salvaged Water statute in order to resolve Wyoming's motion to dismiss Montana's claim regarding increased consumption.

5. Conclusion

Given the law of prior appropriation both at the time the Compact was negotiated and today, I conclude that the Compact does not prohibit Wyoming from allowing pre-1950 appropriators in the State to increase their consumption of water on the lands they were irrigating as of January 1, 1950 by improving their irrigation systems, even when that reduces the runoff that reaches Montana. Nor does the Compact require Wyoming to remedy the reduction in runoff. Although neither the Montana nor Wyoming courts have expressly decided the exact issue presented, the Wyoming Supreme Court's decisions both before and after the negotiation of the Compact strongly indicate that Wyoming appropriators are free to increase consumption on existing acreage through improved irrigation techniques.[15] No Montana case or statute contradicts this rule; instead, Montana law is ultimately inconclusive. The appropriation law of other states does not suggest that Wyoming's rule is anomalous, although some courts might reach different results. As a consequence, the most reasonable interpretation of Article V(A), as applied in this context, is that it does

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[15] Montana objects to the consideration of cases and statutes that postdate the negotiation and ratification of the Compact. *See* Montana's Letter Brief, *supra*, p. 7. *Binning*, of course, was decided before the Compact and, as discussed above, states that appropriators in Wyoming can lawfully increase consumption on existing acreage. Post-Compact law is useful in interpreting and understanding the law that existed as of the Compact's inception. As noted earlier, Article V(A) may also incorporate changes in the law of appropriation. It is unnecessary to resolve the latter question, however, because there is no indication that the relevant law on increases in consumption in either Montana or Wyoming has changed since the inception of the Compact.

not ban increased consumption on existing acreage as a result of improved irrigation.

Because this rule favors upstream appropriators, the rule favors Wyoming over Montana. According to Montana, increased consumption by pre-1950 Wyoming appropriators has already reduced the amount of water available to Montana's pre-1950 uses during periods of low water flow. The rule, however, is not unreasonable. While the rule reduces the security of downstream appropriators who rely on return flow, it also encourages increased conservation (a goal that both Wyoming and Montana, like most western states, share) by giving farmers an incentive that they otherwise would not have to invest in improved irrigation techniques. The potential loss in return flow available to satisfy Montana's pre-1950 uses is also inherently limited. The rule covers only increased consumption on lands that were being irrigated as of January 1, 1950. Any uses of conserved water for "beneficial uses on new lands or for other purposes" would fall under Article V(B) and are subject to the restrictions for post-1950 water uses.

Considerations of practicality reinforce this rule and its logic under the Compact. As noted earlier, neither Montana nor Wyoming requires farmers to seek approval of state water officials before changing irrigation practices. If Montana were correct in its interpretation of the Compact, Wyoming would need to establish a continual process for reviewing changes in irrigation techniques by pre-1950 appropriators, as well as other actions such as crop changes that might increase consumption, in order to ensure that such actions do not increase on-farm consumption (or to try to find a supplemental source of water to make up the difference). As Congress reported in considering

the Compact, one of the Compact's attributes is that its "provisions are easily administered, and require no elaborate organization." Senate Rep. No. 883, *supra*, at 1, Joint App. at 12. The approach taken by the Compact "appears to be easily installed, workable, and not requiring the establishment of a large new organization for its operations." *Id.* at 8, Joint App. at 19. Montana's reading of the Compact would complicate administration of the Compact's guarantees and require new oversight of pre-1950 appropriators in Wyoming.

Montana notes that it is "not necessarily alleging that individual Wyoming appropriators should not be able to increase efficiency and therefore consumptive use on their lands, if otherwise permitted by Wyoming law." Montana's Letter Brief, *supra*, pp. 12-13. Instead, as discussed earlier, Montana seeks only to require Wyoming to provide the same supply of water for pre-1950 Montana rights as "were being supplied when the Compact was adopted." *Id.* p. 13. According to Montana, Wyoming is free to do this in any way that it wishes. *Id.* However, because the return flows are presumably of the greatest importance to pre-1950 Montana appropriators when there are no post-1950 uses which can be reduced or shut down, it is difficult to see how Wyoming could meet what Montana claims is Wyoming's obligation without continually overseeing actions by pre-1950 Wyoming appropriators that might change consumption and without restricting the right of pre-1950 appropriators to engage in such actions when needed to satisfy pre-1950 uses in Montana.

E. Conclusions

For the reasons discussed above, I conclude:

1. The language of the Compact unambiguously protects pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming subsequent to January 1, 1950.

2. Even if the language of the Compact were less clear, the history of the Compact negotiations shows that the Compact was intended to protect pre-1950 appropriative rights in Montana from new diversions and withdrawals in Wyoming subsequent to January 1, 1950.

3. Where Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice Montana's other rights under the Compact, an intrastate remedy is the appropriate solution. Where this is not possible, however, the Compact requires that Wyoming ensure that new diversions or withdrawals in Wyoming not interfere with pre-1950 appropriative rights in Montana.

4. Article V of the Compact clearly protects Montana's pre-1950 appropriations from irrigation of new acreage in Wyoming if that irrigation prevents sufficient water from reaching the pre-1950 uses.

5. Under Article V of the Compact, diversions of water into storage for either beneficial uses on new land or "supplemental water supplies" on existing acreage are to come only from "unused and unappropriated water" after protecting pre-1950 appropriations.

6. Montana, however, cannot demand that Wyoming release water from its reservoirs to satisfy

Montana's pre-1950 uses if the water was stored at a time when sufficient water was reaching Montana to satisfy those uses.

7. The Compact protects Montana's pre-1950 uses from interference by at least some forms of groundwater pumping that dates from after January 1, 1950 where the groundwater is hydrologically interconnected to the surface channels of the Yellowstone River and its tributaries. The question of the exact circumstances under which groundwater pumping violates Article V(A) is appropriately left to subsequent proceedings in this case.

8. Article V(A) of the Compact does not prohibit Wyoming from allowing its pre-1950 appropriators to conserve water through the adoption of improved irrigation techniques and then use that water to irrigate the lands that they were irrigating as of January 1, 1950, even when the increased consumption interferes with pre-1950 uses in Montana. Uses of conserved water for "beneficial use on new lands or for other purposes," by contrast, fall within Article V(B) of the Compact and are subject to the same restrictions discussed above for post-1950 water uses.

For all these reasons, I recommend that Wyoming's Motion to Dismiss be denied.

IV. MONTANA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Montana moves for partial summary judgment that the Yellowstone River Compact applies to all surface waters tributary to the Tongue and Powder Rivers. In opposing Montana's initial motion for leave to file this action, Wyoming argued that Montana could not complain about waters stored in reservoirs that are located on tributaries to, rather than the main stems

of, the Tongue and Powder Rivers. According to Wyoming's opposition brief, "the Compact does not purport to govern water stored in reservoirs on the tributaries to the Tongue, Powder, and Little Powder, the only reservoirs about which Montana complains." Wyoming's Brief in Opposition to Motion for Leave to File Bill of Complaint, April 1, 2007, pp. 21-22 ("Wyoming's Brief in Opposition to Leave to File"). Because Wyoming suggested during the hearing on its Motion to Dismiss that it still did not believe that the Compact applies to tributaries to the Tongue and Powder Rivers, Montana brought its Motion for Partial Summary Judgment to resolve that question.

Montana, Wyoming, and the United States (as *amicus curiae*) filed briefs on Montana's Motion for Partial Summary Judgment. A hearing was held on Montana's motion on November 17, 2009 in Stanford, California.

During the briefing and hearing on Montana's Motion for Partial Summary Judgment, it became apparent that Montana and Wyoming, as well as the United States as *amicus curiae*, now agree that Article V(A) applies to all water uses in the Yellowstone River Basin, including water diversions and storage on the Powder and Tongue Rivers and the tributaries to those rivers. The parties and *amicus* disagree, however, on whether Article V(B) applies to water diversions and storage on the tributaries to those rivers—and even whether the reach of Article V(B) is legitimately at issue in this proceeding.

The protections of Article V(A) clearly apply to diversions and storage of water from tributaries to the Tongue and Powder Rivers. Article V(A) provides expansively that, "Appropriative rights to the beneficial uses of the water of the Yellowstone River

System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed . . ." The definition of the term "Yellowstone River System" as used in Article V(A) explicitly includes the tributaries to the Tongue and Powder Rivers. As noted earlier, Article II(D) of the Compact defines "Yellowstone River System" as "the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River near Buford, North Dakota . . ." Article II(E), in turn, defines the term "Tributary" to mean "any stream which in a natural state contributes to the flow of the Yellowstone River, including *interstate tributaries and tributaries thereof* . . ." (emphasis added). And Article II(F) includes both the Tongue and Powder Rivers in its definition of "Interstate Tributaries." Article V(A) thus prohibits diversions of water for direct use or storage on tributaries to the Powder and Tongue rivers if the diversions interfere with pre-1950 appropriative rights in Montana in violation of the Compact. The only exceptions are diversions for water uses explicitly excluded from the provisions of the Compact under Article V(E). Because the Compact is clear on this issue, there is no need to resort to the history of the Compact or any other extrinsic evidence in resolving the Compact's coverage.

As noted, there no longer appears to be any disagreement on this issue. Both Montana and the United States, as *amicus curiae*, have consistently taken the position that Article V(A) protects against diversions from the tributaries to the Tongue and Powder Rivers for either direct use or storage. Although Wyoming originally argued that the Compact does not cover reservoirs on these tributaries, Wyoming explains that it took this position because it believed that Montana was basing its case

on Article V(B) of the Compact rather than Article V(A). As discussed below, Wyoming does not believe that Article V(B) applies to the tributaries to the Tongue and Powder Rivers. According to Wyoming, however, it has always agreed that Article V(A) covers not only the main stems of but also the tributaries to these rivers. *See* Wyoming's Brief in Opposition to Montana's Motion for Partial Summary Judgment, Nov. 2, 2009, p. 12 ("Wyoming's Brief in Opposition to Summary Judgment"); Wyoming's Brief in Opposition to Leave to File, *supra*, p. 21 n.8.

Montana's Motion for Partial Summary Judgment is not limited to Article V(A) but seeks more broadly a ruling that the entire Yellowstone River Compact applies to "all surface waters tributary to the Tongue and Powder Rivers." Montana's Motion for Partial Summary Judgment on the Yellowstone River Compact's Application to Tributaries of the Tongue and Powder Rivers, Oct. 16, 2009. Both in its briefs and at oral argument, Montana has made it clear that it ideally would like a ruling that not only Article V(A) but also Article V(B) applies to the tributaries. *See, e.g.*, Montana's Reply in Support of Motion for Summary Judgment, Nov. 9, 2009, pp. 2-3 ("Montana's Summary Judgment Reply"); Hearing Trans. (Summary Judgment), p. 22, lines 3-20.

Montana and Wyoming disagree as to whether Article V(B) is properly part of Montana's case and therefore whether Montana can seek a ruling on its coverage. Wyoming argues that the "briefing and oral argument in this case has [sic] clarified that Montana's claims for relief are not based on an alleged violation of Article V.B. of the Compact" and that it is therefore "neither necessary nor proper for the Special Master" to rule on its scope. Wyoming's

Brief in Opposition to Summary Judgment, *supra*, p. 2. The United States, as *amicus curiae*, also argues that the scope of Article V(B) is "outside the scope of the complaint as pleaded" and that Montana cannot raise issues under Article V(B) without moving for leave to amend its Complaint. Brief for the United States as *Amicus Curiae* in Partial Support of Montana's Motion for Summary Judgment, Nov. 2, 2009, p. 3. Montana, by contrast, argues that it has stated its claims broadly to include all portions of Article V. *See* Montana's Summary Judgment Reply, *supra*, pp. 4-10.

Montana and Wyoming also disagree regarding the scope of Article V(B). Unlike Article V(A), Article V(B) applies to the "unused and unappropriated waters of the Interstate tributaries" (emphasis added). The term "*Interstate Tributaries*," in turn, is defined in Article II(F) as "the Clarks Fork, Yellowstone River; the Bighorn River (except Little Bighorn River); the Tongue River; and the Powder River . . ." Wyoming argues that this language demonstrates that Article V(B) does not extend to the tributaries to the Tongue and Powder Rivers. As Wyoming notes, Article II(F) speaks only of the five specific rivers and not expressly of their tributaries, in contrast to Article II(E) that talks of "interstate tributaries and *tributaries thereof*" (emphasis added). *See* Wyoming's Brief in Opposition to Summary Judgment, *supra*, pp. 8-11. Montana, however, responds that Article V(B) covers tributaries to the named rivers because the term "Interstate Tributaries" includes the word "Tributaries," and Article II(E) defines "Tributary" as including tributaries to the interstate tributaries. Montana's Brief in Support of its Motion for Summary Judgment, Oct. 16, 2009, p. 10. Noting that Article II(F) explicitly

excludes the Little Bighorn River from the term "Interstate Tributaries," Montana also argues that this exclusion would have been unnecessary if the term did not otherwise include tributaries to the listed rivers. *Id.*, pp. 10-11.

There is no need at this stage of the case to decide the scope of Article V(B) of the Compact (or the meaning of "Interstate Tributaries" as defined in Article II(F)). As discussed above, pre-1950 appropriators in Montana are protected by Article V(A) of the Compact. Although Article V(B) reinforces the protections of Article V(A) by allocating only "unused and unappropriated" waters, Article V(B) does not appear to provide any independent protection for pre-1950 appropriations separately from Article V(A). Based on the briefing and hearings to date, Montana also has yet to show that Article V(B) is likely to have separate significance in this proceeding. As a result, it would be inappropriate at this stage of the proceeding to address the coverage of Article V(B). Any such ruling would go beyond what currently appears to be necessary to resolve Montana's claim.

It also is unnecessary at this point to decide the legitimate scope of Montana's Complaint. Although both Wyoming and the United States suggest that the Complaint is limited to Article V(A) and the substantive arguments to date have focused on that article, the Complaint is broadly written to claim the protection of Article V as a whole, rather than of individual subparts. Article V, moreover, constitutes a comprehensive scheme of which Article V(A) is one interconnected part. Montana might ultimately be able to show the independent relevance of Article V(B) to this proceeding.

For the reasons discussed, I recommend that Montana's Motion for Summary Judgment be granted in part and denied in part without prejudice. In particular, I recommend that the Court hold that Article V(A) of the Compact applies to all surface waters tributary to the Tongue and Powder Rivers (with the exception of the explicit exclusions set out in Article V(E) of the Compact). However, the Court should decline at this time to address the reach of Article V(B) of the Compact and the meaning of the term "Interstate Tributary."

V. ANADARKO'S MOTION TO INTERVENE

Anadarko Petroleum Corporation ("Anadarko") seeks leave to intervene as a party. As noted earlier, Montana alleges that the "pumping of groundwater associated with coalbed methane production in the Tongue and Powder River Basins" is impairing downstream flows and violating its rights under the Compact. Bill of Complaint ¶ 11. Anadarko is one of the principal companies involved in such production. Anadarko extracts natural gas from coal seams in the basin of the Powder River. Declaration of John A. Broman ¶ 2 ("Broman Declaration"), attached to the Motion of Anadarko Petroleum Corporation for Leave to Intervene, July 17, 2009 ("Motion to Intervene"). During its production process, Anadarko pumps groundwater from coal seams in order to free the natural gas trapped in the coal. *Id.* Although Montana alleges that coalbed methane pumping is impairing pre-1950 appropriations, Montana seeks no relief directly against Anadarko, nor is Anadarko specifically mentioned in Montana's Complaint.

Montana and the United States, as *amicus curiae*, filed briefs opposing Anadarko's Motion to Intervene. Wyoming, by contrast, filed a one-sentence letter

brief noting that it does not object to the Motion to Intervene. North Dakota, which is not playing an active role in the case, did not file any papers regarding the Motion to Intervene. A hearing was held on the Motion to Intervene on October 8, 2009 in Denver, Colorado.

I conclude that the Motion to Intervene should be denied. At this point in time, Anadarko has failed to show either that it has an interest sufficiently distinct from all other groundwater users in the basins of the Yellowstone River tributaries to justify intervention or, more importantly, that the State of Wyoming will not properly represent Anadarko's interests. Intervention at this stage could unnecessarily complicate the case and, during discovery and trial, potentially lengthen the proceedings. Anadarko can help inform the resolution of issues concerning the Compact's coverage of groundwater through the mechanisms available to an *amicus curiae* without becoming a party to this original matter. Intervention is unnecessary for full exploration of the issues.

A. The Applicable Legal Standard for Intervention

As the Supreme Court recently reconfirmed, intervention by private and public water users in original jurisdiction cases before the Court involving interstate water disputes is neither appropriate nor desirable except in unusual and compelling circumstances, and special masters should therefore employ a high standard in considering motions to intervene. *See South Carolina v. North Carolina*, 558 U.S. ___ (2010) (denying the City of Charlotte's motion to intervene in an interstate dispute involving the Catawba River, but granting intervention to the other two uniquely situated non-state entities); *New*

Jersey v. New York, 345 U.S. 369 (1953) (denying the City of Philadelphia's motion to intervene in an interstate dispute involving the Delaware River). Although the standard for intervention is not insurmountable (*South Carolina v. North Carolina*, *supra*, slip op. at 10), individual water users "ordinarily . . . have no right to intervene in an original action." *United States v. Nevada*, 412 U.S. 534, 538 (1973). For this reason, special masters have generally been cautious about granting motions to intervene, lest original jurisdiction matters involving sovereign states turn into "intramural disputes" or *de facto* class actions involving multiple parties each pursuing their own interests.

As the Court noted in *South Carolina v. North Carolina*, both due respect for "sovereign dignity" and a "working rule for good judicial administration" drive this high standard for intervention. Slip op. at 9, quoting *New Jersey v. New York*, 345 U.S. at 373. In deciding a motion to intervene in original jurisdiction actions, it is appropriate to assume, absent evidence to the contrary, that states will adequately and appropriately represent the interests of their water users. The *parens patriae* doctrine recognizes "the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *New Jersey v. New York*, 345 U.S. at 372, quoting *Kentucky v. Indiana*, 281 U.S. 163, 173-174 (1930). *See also South Carolina v. North Carolina*, *supra*, slip op. at 8; *Nebraska v. Wyoming*, 515 U.S. 1, 21-22 (1995) (a "State is presumed to speak in the best interests" of all its citizens); *Maryland v. Louisiana*, 451 U.S. 725, 737 (1981) (states "act as the representative" of their citizens as a whole).

The *parens patriae* doctrine applies not only where water users are citizens of one of the state parties but also where water users are citizens of other states but use the waters of one of the state parties. Although the Court often speaks of states representing all their "citizens," states in interstate water disputes stand as representatives of all their water users, whether or not those water users are technically citizens of the states. *See, e.g., Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935) (holding that the United States Secretary of the Interior was not an indispensable party in an interstate water dispute involving the North Platte River, despite a local federal reclamation project, because Wyoming would "stand in judgment for him as for any other appropriator").

Interstate water disputes such as the instant action by Montana inherently deal with sovereign interests that supersede the interests of individual water users. Interstate water disputes before the Supreme Court are cases "between States, each acting as a quasi-sovereign and representative of the interests and rights of her people in a controversy with the other." *Wyoming v. Colorado*, 286 U.S. 494, 508-509 (1932). The waters of a state affect the prosperity of its people as a whole. As a result, Montana's lawsuit rises "above a mere question of local private right and involves a matter of state interest." *Kansas v. Colorado*, 206 U.S. 46, 99 (1907). *See also Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (interstate water disputes involve the "unique interests" of sovereign states).

As the Court has observed, there are not only jurisprudential but practical reasons to set a high standard for intervention in interstate water disputes

such as this one. *See, e.g., South Carolina v. North Carolina, supra*, slip op. at 9; id. at 3-4 (Roberts, C.J., dissenting). Montana's lawsuit potentially affects hundreds of water users in the involved states. If the principle of *parens patriae* were ignored and intervention freely granted, there could be "no practical limitation on the number of citizens, as such, who would be entitled to be made parties," and the Supreme Court's original jurisdiction could readily be "expanded to the dimensions of ordinary class actions." *New Jersey v. New York, supra*, 345 U.S. at 373. *See also Utah v. United States*, 394 U.S. 89 (1969) (denying intervention by a private landowner, in part because, if intervention were allowed, "fairness would require the admission of any of the other 120 private landowners" in a similar position, "greatly increasing the complexity of this litigation").

In evaluating Anadarko's Motion to Intervene, I have therefore used the rigorous standard that the Court originally set out in *New Jersey v. New York* and recently reconfirmed in *South Carolina v. North Carolina*: a private entity should be permitted to intervene only where (1) it has "some compelling interest in [its] own right," (2) that interest is different from the interests of "all other citizens and creatures of the state" as a class, and (3) the interest is "not properly represented by the state." *New Jersey v. New York, supra*, 345 U.S. at 373; *South Carolina v. North Carolina, supra*, slip op. at 8. *See also Nebraska v. Wyoming, supra*, 515 U.S. at 21-22.

Anadarko suggests that the standard for intervention might be lower in a case, such as this one, involving the interpretation and application of an interstate compact, than in original jurisdiction

cases, such as *New Jersey v. New York* and *South Carolina v. North Carolina*, seeking an equitable apportionment of the waters of an interstate river. *See* Motion to Intervene, *supra*, p. 5. As Anadarko notes, the rights of water users in an equitable apportionment case are derivative of those of the state in which they withdraw water. *See Nebraska v. Wyoming*, *supra*, 295 U.S. at 43 (water user's rights "can rise no higher than those of" the State). In Anadarko's view, compacts, by contrast, are akin to federal statutes or regulations. Anadarko therefore suggests that it should have as much right to participate in interpreting a compact as it would in challenging a new federal regulation. Motion to Intervene, *supra*, pp. 7 & 9.

Compacts, however, are agreements among states acting in their sovereign capacity. The only parties to the Compact in this case are Montana, North Dakota, and Wyoming. Because Congress must consent to any compact, judicial interpretations of compacts draw on the rules of statutory interpretation, and compacts have the force of federal law. *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (federal law); *Oklahoma v. New Mexico*, 501 U.S. 221, 234 n.5 (1991) (applying rules of statutory interpretation); *Texas v. New Mexico*, 462 U.S. 554, 564 (1983), quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981) (federal law). However, these aspects of compact procedure, interpretation, and authority do not change the fact that compacts are sovereign, not private, agreements. Given the sovereign character of compacts, there is no justification for using a lower standard for

intervention in cases involving compacts than in cases seeking equitable apportionments.[1]

B. Anadarko Has Not Met the Standards for Intervention

Anadarko has failed to show that it currently meets the standards for intervention set out in *New Jersey v. New York*. Anadarko would appear to have a significant interest in one of the central questions in this case: what groundwater withdrawals, if any, does section V(A) of the Yellowstone River Compact constrain? As noted above, Anadarko pumps groundwater from coal seams in the Powder River basin in order to free the natural gas trapped in the coal. Broman Declaration, *supra*, ¶ 2. Such natural gas is known as coalbed natural gas or coalbed methane ("CBM"). *Id.* The production of CBM uses a large volume of water. *Id.* ¶ 3. If this case ultimately concludes that the Yellowstone River Compact protects pre-1950 appropriations in Montana from groundwater withdrawals occurring as part of Anadarko's CBM operations in the Powder River basin, this holding could negatively affect Anadarko's ability to produce natural gas from coal beds in the Powder River basin and thereby "compromise its business operations." *See* Reply of Anadarko Petroleum Corporation to Oppositions to Its Motion for

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[1] In fact, one could argue that intervention is less appropriate in original actions involving compacts than in equitable apportionment cases. As the Court noted in *South Carolina v. North Carolina*, equitable apportionment requires the "exercise of an informed judgment," and non-state water users may sometimes be the best source of information relevant to that inquiry. Slip op., at 14. A compact case, by contrast, involves only the interpretation of a sovereign agreement among two or more states.

Leave to Intervene, Sept. 25, 2009, p. 2 ("Anadarko's Reply Brief"); Motion to Intervene, *supra*, p. 5.[9]

Anadarko, however, has failed to establish either that its interest in this case is significantly different from that of other post-1950 water users in the river basins at issue in this case or, more importantly, that Wyoming will not properly represent Anadarko's interest. Turning to the first issue, Anadarko argues that its interest is unique and different from other water users in the river basins because it does not believe that the groundwater that it is extracting is "subject to allocation under the Compact in the first place." Motion to Intervene, *supra*, p. 6. Assuming that this is a meaningful distinction, all groundwater users in the relevant river basins could make the same argument. All groundwater users have an interest at this stage of the proceeding in establishing that their groundwater withdrawals are not subject to the Compact.

Anadarko argues that there are particularly strong reasons to conclude that Article V(A) does not extend to the groundwater withdrawn in its CBM operations

[9] Such a holding would not necessarily require Wyoming to restrict Anadarko's pumping of groundwater. Montana seeks only to protect its appropriations; it does not specify how Wyoming should provide that protection. So long as Wyoming reduces withdrawals from the Yellowstone River in other ways that offset any effect of Anadarko's groundwater withdrawals (and thereby protects pre-1950 Montana appropriations), Montana arguably would have no ground to complain under the Compact. If the Supreme Court ultimately concludes that the Compact protects pre-1950 appropriations from Anadarko's operations, however, Wyoming would seem likely to restrict Anadarko's pumping to whatever degree is necessary to avoid violating the Compact, posing a serious risk to Anadarko's operations.

in the Powder River basin. In particular, Anadarko argues that the groundwater it pumps as part of its operations is not hydrologically connected to the Powder River and thus not subject to the Compact even if other groundwater is. According to Anadarko, "CBM pumping takes place at depths that agricultural pumping may not reach" and where "there is at least a serious issue . . . whether any meaningful hydrological interconnection exists [with] the surface water of the Powder River within Montana." Motion to Intervene, *supra*, p. 2. Anadarko also argues that, while some experts believe that CBM operations can "reduce surface flows in limited circumstances," CBM can also "*increase* surface waters where the water pumped to the surface is discharged to a surface pond or directly to the stream." *Id.* However, even if Anadarko has stronger arguments than many shallower groundwater users that Article V(A) does not reach the groundwater it extracts, this does not separate Anadarko's interest from that of other groundwater users. The difference between Anadarko's interest and that of other groundwater users is at best one of degree rather than kind. Like Anadarko, all groundwater users currently have an interest in excluding the groundwater they pump from the specific reach of the Compact.

If Anadarko were allowed to intervene, there thus would be no basis for denying applications of other groundwater users seeking to intervene. Anadarko suggests that there is little risk of its intervention leading to the intervention of other water users and the devolution of this action into a *de facto* class action. Motion to Intervene, *supra*, p. 9. As Anadarko notes, it is the only water user that to date has sought to intervene (and one of only two entities that has participated as an *amicus*). This procedural

setting, however, is no different from *New Jersey v. New York*, where only Philadelphia was seeking to intervene. Allowing Anadarko to intervene in this action might well prompt other water users to raise similar motions to intervene. According to Montana, there are "thousands of CBM wells pumping in Wyoming involving many businesses and property interests." Montana's Response in Opposition to Motion of Anadarko Petroleum Corporation for Leave to Intervene, Sept. 18, 2009, p. 6. *See also* Hearing Trans. (Motion to Intervene), p. 53, lines 3-6 (total number of CBM wells is 12,000 to 13,000). Although only eight companies apparently engage in the vast majority of CBM pumping (*id.*, p. 33, lines 17-21; *see also* Anadarko's Reply Brief, *supra*, p. 9 n.3), all companies could potentially seek to intervene.

Anadarko responds that, if other water users seek to intervene, their motions could be denied either as untimely or on the ground that Anadarko would adequately represent their interests. Anadarko's Reply Brief, *supra*, p. 9. Other water users, however, could reasonably argue that they had previously assumed that motions to intervene would be denied or that, because Anadarko has become a party, they now need to intervene to protect their own separate interests. Granting leave to intervene to Anadarko alone among all groundwater and surface-water users could risk inappropriately biasing the proceeding in favor of Anadarko's interests. Furthermore, although Anadarko might adequately represent the interests of other CBM drillers, the very arguments that Anadarko makes in favor of intervention (*i.e.*, that its interests are distinct from those of other water users) suggests that they could not adequately represent other non-CBM water users. Only states reflect the broad interests of all water users, which is

why intervention by individual water users is generally not allowed in interstate water disputes before the Supreme Court.

Even if Anadarko had a unique interest in this case that is significantly different from that of other water users, moreover, Anadarko has failed to show that Wyoming will not properly represent Anadarko's interests. In its Motion to Dismiss, Wyoming argued that the Compact does not apply to *any* groundwater, a position that is totally consistent with that of Anadarko. Motion to Dismiss, *supra*, pp. 59-63. There is currently no evidence that Wyoming will not continue to try to minimize the reach of the Compact and argue that, even if the Compact applies to some groundwater, the Compact applies only to groundwater with the strongest hydrologic connections to the surface waters of the involved tributaries.

Anadarko speculates that, in future proceedings, Wyoming's views of what groundwater, if any, is covered by Article V(A) of the Compact might diverge from the views of Anadarko. According to Anadarko, Wyoming has multiple, potentially conflicting interests in the resolution of this case, and therefore Wyoming's determination of how to define coverage "is not likely to coincide with Anadarko's stake in preserving the viability [of] one of its most significant business operations." Motion to Intervene, *supra*, p. 7. Indeed, Anadarko suggests that Wyoming might conclude for political reasons that it is in the best interests of the State to include CBM pumping in the groundwater covered by Article V(A) of the Compact. According to Anadarko, "it is not at all clear where the State's interest lies. Some agricultural users may feel that if the groundwater they rely on is subject to the Compact, it might be to their advantage to have

the Compact interpreted so as to expand the reach of groundwater potentially available to satisfy the demands of downstream users in Montana with a prior claim." Anadarko's Reply Brief, *supra*, p. 7. *See also* Hearing Trans. (Motion to Intervene), p. 20, lines 10-15 ("The State of Wyoming and the citizens of the State of Wyoming, agricultural interest farmers, may seek to include more waters under the compact in order to have available to the State of Wyoming an additional ability to try and satisfy any calls that may be made under the compact").

Anadarko's effort to show why Wyoming *might* not properly represent the interests of Anadarko and other CBM pumpers in Wyoming is factually unconvincing. If Anadarko's operations actually do affect the amount of water that reaches downstream users in Montana, Wyoming does not have to argue that the Compact reaches such operations in order to offset other violations of the Compact by restricting Anadarko's pumping. Wyoming can simply exercise its state powers to restrict Anadarko's operations. Indeed, if Anadarko's pumping is covered by the Compact, that inclusion could reduce Wyoming's ability to offset other violations because the rights of pre-1950 Montana appropriators might require the cessation of *all* pumping in Wyoming. By contrast, if Anadarko's operations do not affect the water that reaches downstream users, extending the reach of the Compact to those operations will not help other groundwater users, because a reduction in Anadarko's pumping will not remedy any impact that those other groundwater users have on pre-1950 appropriators in Montana.

Whatever the factual merits of Anadarko's argument, moreover, the argument is at best conjecture

and not actual evidence of a conflict between Wyoming's position in this case and the interests of CBM pumpers such as Anadarko. Anadarko notes that, to establish a right to intervene under Federal Rule of Civil Procedure 24, someone moving to intervene need not show that representation by the government would be inadequate. Instead, the movant need establish only "sufficient doubt about the adequacy of representation" and that "representation of his interest 'may be' inadequate." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 & n. 10 (1972). As Anadarko also recognizes, however, the Federal Rules "are only a guide to procedures in an original action." *Arizona v. California*, *supra*, 460 U.S. at 614. *See South Carolina v. North Carolina*, *supra*, slip op. at 18-19 n.8; U.S. Supreme Court Rule 9.2.

Given the unique nature of original jurisdiction matters before the Supreme Court, a private water user seeking to intervene must demonstrate more than a mere chance that the state within which it is operating will not properly represent its interests. Even in regular civil matters before federal courts, a number of circuit courts demand a "strong affirmative showing that the sovereign is not fairly representing the interests" of the proposed intervenor. *See, e.g., United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984); *Environmental Defense Fund v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979). The standard should be higher in original matters where states' sovereign interest over water is involved.

In *New Jersey v. New York*, Philadelphia also argued that it could not "rely for an adequate presentation of its interest upon Pennsylvania," noting that it was "without any guide" as to what Pennsylvania's

"policy on the Delaware now is or later may be." Memorandum in Support of the Motion of the City of Philadelphia for Leave to Intervene and To File an Answer to the Petition of the City of New York for Modification of the Decree, *New Jersey v. New York*, No. 5, Original, p. 6 (March 7, 1953). The Court, however, denied Philadelphia's motion to intervene, noting that the city had "been unable to point out a *single concrete consideration* in respect to which the Commonwealth's position does not represent Philadelphia's interests." 345 U.S. at 374 (emphasis added). Similarly, in this case, Anadarko has failed to show any concrete evidence that Wyoming will not properly represent Anadarko's interests as a user of groundwater in that State.

As explained earlier, a state "must be deemed to represent all of its citizens" in interstate water litigation. *New Jersey v. New York*, 345 U.S. at 372, quoting *Kentucky v. Indiana*, 281 U.S. 163, 173-174 (1930). When I asked Wyoming at the hearing on Anadarko's Motion to Intervene whether the State will appropriately represent the interests of Anadarko and other CBM companies, Wyoming noted that it was difficult to answer the question because it was not sure yet what positions it would take in the litigation in the future. Hearing Trans. (Motion to Intervene), p. 45, lines 15-20. Wyoming's comments at the hearing, however, give little reason to believe that it will not properly represent Anadarko's interests. According to Wyoming, "if [the Court] were to choose not to allow Anadarko to intervene obviously we as the State of Wyoming would do the best of our ability to represent all the interests within the state." *Id.*, p. 51, lines 9-12. At this point in time, Wyoming "would like to be able to adequately represent everybody." *Id.*, p. 46, lines 4-6. Although Wyoming has

not made a determination of how it specifically will handle the CBM issue, moreover, its implementation of its state water laws is reportedly consistent with the position that CBM groundwater is not closely linked hydrologically with most surface waters. *See id.*, p. 47, lines 13-19 (from "the standpoint of within our own state and how we manage the conjunctive resource would probably suggest that we don't see many examples where this coal bed methane water is really impacting the surface flows as far as how we make our own statutes, but how we would treat it under this compact we just haven't made that decision").

Practical considerations also militate against permitting Anadarko to intervene at this point in time. Even if no other water user sought to follow in Anadarko's footsteps and moved to intervene, Anadarko's intervention still would unnecessarily complicate this action and could potentially delay the action's ultimate resolution. Anadarko would be entitled to participate actively in discovery, to present expert and other testimony, to cross-examine witnesses at trial, to file exceptions to reports, and to object to settlements. *See South Carolina v. North Carolina*, *supra*, slip op. at 12 (Roberts, C.J., dissenting) (noting that intervention can "prolong the resolution" of original actions). Absent evidence that Wyoming will not properly represent Anadarko's interests, there is no justification for complicating the case and potentially delaying its resolution.

Granting Anadarko's Motion to Intervene, moreover, would also establish a precedent for intervention by a wide array of water users in future interstate water disputes before the Supreme Court. The question of what water is covered is endemic to inter-

state water disputes involving compacts, Congressional apportionments, and prior Supreme Court decrees. Several recent interstate water cases involving interstate compacts have involved the question of what, if any, groundwater is covered under the compact. *See, e.g., Kansas v. Colorado*, 543 U.S. 86, 90-91 (2004); *Kansas v. Nebraska*, 530 U.S. 1272 (2000). *See also Texas v. New Mexico*, 462 U.S. 554 (1983). Under Anadarko's arguments, groundwater users in all such cases could intervene to show that the compact at issue does not cover either groundwater use in general or their particular groundwater use. Other interstate water disputes before the Supreme Court have often involved similar questions regarding what types of water and waterbodies are included in compacts, Congressional apportionments, or prior judicial decrees. *See, e.g., Arizona v. California*, 373 U.S. 546 (1963) (dealing with the question of whether the Boulder Canyon Project Act included Arizona tributaries to the Colorado River in its apportionment of Colorado River waters). Under Anadarko's arguments, water users could intervene in such actions on the theory that they are seeking only to establish that particular waters or waterbodies are or are not included.

Anadarko's status is similar to that of the City of Charlotte in *South Carolina v. North Carolina*.[19]

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[19] As a matter of pure size and significance, Anadarko would actually seem to have a weaker argument for intervention than the argument that the City of Charlotte enjoyed. The City had been granted one of only two permits to transfer water from the Catawba River, and its permit was by far the larger of the two. Slip op., at 2. The City was also named in South Carolina's complaint, although South Carolina sought no relief against the City. Slip Op. at 17. By contrast, Anadarko is one of a large

Anadarko's interest in this case, like that of the City of Charlotte in *South Carolina v. North Carolina*, stems from its use of the waters of a state defendant. As a result, Anadako's "interest falls squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens." Slip op. at 17. Just as North Carolina noted that it could adequately represent Charlotte's interest (*id.* at 18), Wyoming has stated that it will do its best to adequately represent Anadarko's interest.

Two other issues raised by Anadarko's Motion to Intervene deserve brief discussion. First, Anadarko notes in passing that it is not a citizen of Wyoming (Anadarko's Reply Brief, *supra*, p. 8) but instead is incorporated in Delaware with its principal place of business in Texas (Hearing Trans. (Motion to Intervene), p. 21, lines 13-16), suggesting that the normal assumption that states will properly represent individual water users is inappropriate in this case. According to Anadarko, "it's certainly not inconceivable that the State of Wyoming may take the position, as states often do, to the benefit of their own citizens over that of a foreign corporation." *Id.*, p. 21, lines 8-12. As noted earlier, however, the presumption that states will provide proper representation in interstate water disputes applies not simply to the citizens of a state but to all of its water users. States in their sovereign capacity have an interest in protecting their waters from claims of other states, no matter who is using or not using the waters. If intervention standards varied depending on whether a water user is a citizen of a state, foreign corporations would be at an advantage in seeking to intervene,

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number of groundwater users in Wyoming and was not named in Montana's complaint.

and any corporation that wished to intervene could simply change its state of incorporation in order to improve its odds of being permitted to intervene.

Second, Anadarko suggests that, because it does not believe its operations are covered by the Compact, its rights and interests are "not subsidiary to the State of Wyoming's interest. We have a completely separate interest." Hearing Trans. (Motion to Intervene), p. 18, lines 17-19. Anadarko's interests are subsidiary to Wyoming's interest, however, not because its groundwater withdrawals might be covered by the Compact (an issue that has not been resolved yet), but because it is utilizing the water resources of the State. On the question whether the groundwater that Anadarko is extracting as part of its CBM operations is part of the Yellowstone River waters allocated by the Compact, Anadarko's rights are derivative of the rights of Wyoming.

C. Conclusion

For the reasons discussed above, I recommend that Anadarko's Motion to Intervene be denied. Anadarko has not met the standard for intervention set out in *New Jersey v. New York*. Anadarko has not shown that it has a compelling interest that is different in kind or character from those of "all other citizens and creatures of the state." 345 U.S. at 373. More importantly, Anadarko has not shown that its interest will not be properly represented by the State of Wyoming. Indeed, Wyoming noted during the hearing on Anadarko's Motion to Intervene that it plans to "represent all the interests within the state" to the best of its ability. Hearing Trans. (Motion to Intervene), p. 51, lines 9-12. Far from aiding in the resolution of this action, intervention at the moment would inevitably complicate the proceedings and

could ultimately delay the action's resolution. If the circumstances of this case should change in the future in a manner that would meet the requirements for intervention, Anadarko can bring a new motion to intervene at that time.

While Anadarko has not met the standard for intervention in interstate water disputes before the Supreme Court, Anadarko makes a strong argument that it can provide useful information and argument on whether and how the Compact applies to groundwater extraction, particularly in the context of CBM production. As Anadarko notes in its motion, it has "access to a wealth of information concerning CBM operations and the related issues of hydrology." Motion to Intervene, *supra*, p. 6. Intervention, however, is not currently needed to obtain the benefit of Anadarko's perspective and expertise. Allowing Anadarko to participate actively as an *amicus curiae*, where appropriate, should permit Anadarko to inform these proceedings and represent its interests without raising the problems of intervention discussed earlier. *See South Carolina v. North Carolina*, *supra*, slip op. at 9 (Roberts, C.J., dissenting) ("Parties to litigation have ready means of access to relevant information held by nonparties, and those nonparties can certainly furnish such information on their own if they consider it in their best interests (through, for example, participation as *amicus curiae*)).

I have already allowed Anadarko to file a brief as amicus curiae in support of Wyoming's Motion to Dismiss (although I denied Anadarko's motion to participate in the oral argument on that motion). *See* Case Management Order No. 1, Nov. 25, 2008, ¶ 6 (granting motion for leave to file brief); Modification

to Case Management Order No. 1, Dec. 12, 2008, ¶ 2 (denying motion for divided argument). I will continue to use my procedural authority in this case to ensure the full and fair exposition of the factual and legal issues. In *Nebraska v. Wyoming*, the Special Master "provided for active involvement in the case by the *amici*, allowing them to present affidavits, file briefs, including reply briefs, as well as the potential to participate more fully respecting key matters in the proceedings upon showing of good cause." First Interim Report of the Special Master, *Nebraska v. Wyoming*, No. 108, Original, at 6 (June 14, 1989). The Special Master suggested that an amicus could even "selectively be permitted to introduce evidence . . . to develop certain issues." Third Interim Report on Motions To Amend the Pleadings, *Nebraska v. Wyoming*, No. 108, Original, at 20 (Dec. 11, 2000). Given Wyoming's participation in the case and my authority to permit Anadarko to provide information and argument as an *amicus* where appropriate, Anadarko's intervention as a party is not currently required to fully and appropriately develop the issues in this matter.[20]

VI. RECOMMENDATIONS

For the reasons discussed above, I recommend that:

1. Wyoming's Motion to Dismiss should be denied.

2. Montana's Motion for Summary Judgment should be granted in part and denied in part without prejudice. In particular, the Court should hold that

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[20] The question of exactly what role Anadarko might play on issues of groundwater as an *amicus* is best resolved at a later point in the proceedings when both the nature of the issues and the potential contributions of Anadarko are clearer.

Article V(A) of the Compact applies to all surface waters tributary to the Tongue and Powder Rivers (with the exception of the explicit exclusions set out in Article V(E) of the Compact). The Court, however, should decline to address the reach of Article V(B) of the Compact and the meaning of the term "Interstate Tributary."

3. Anadarko's Motion to Intervene should be denied.

A proposed Decree embodying my recommendations is attached as Appendix B.

Respectfully submitted,

BARTON H. THOMPSON, JR.
Special Master
Stanford, California

February 10, 2010

APPENDIX A

Yellowstone River Compact

Pub. L. No. 82-231, 65 Stat. 663 (1951)

The State of Montana, the State of North Dakota, and the State of Wyoming, being moved by consideration of interstate comity, and desiring to remove all causes of present and future controversy between said States and between persons in one and persons in another with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park, and desiring to provide for an equitable division and apportionment of such waters, and to encourage the beneficial development and use thereof, acknowledging that in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin the great importance of water for irrigation in the signatory States shall be recognized, have resolved to conclude a Compact as authorized under the Act of Congress of the United States of America, approved June 2, 1949 (Public Law 83, 81st Congress, First Session), for the attainment of these purposes, and to that end, through their respective governments, have named as their respective Commissioners:

For the State of Montana:

Fred E. Buck	P. F. Leonard
A. W. Bradshaw	Walter M. McLaughlin
H. W. Bunston	Dave M. Manning
John Herzog	Joseph Muggli
John M. Jarussi	Chester E. Onstad
Ashton Jones	Ed F. Parriott
Chris. Josephson	R. R. Renne
A. Wallace Kingsbury	Keith W. Trout

For the State of North Dakota:

I. A. Acker	Einar H. Dahl
J. J. Walsh	

For the State of Wyoming:

L. C. Bishop	N. V. Kurtz
Earl T. Rower	Harry L. Littlefield
J. Harold Cash	R. E. McNally
Ben F. Cochrane	Will G. Metz
Ernest J. Goppert	Mark N. Partridge
Richard L. Greene	Alonzo R. Shreve
E. C. Gwillim	Charles M. Smith
E. J. Johnson	Leonard F. Thornton
Lee E. Keith	M. B. Walker

who, after negotiations participated in by R. J. Newell, appointed as the representative of the United States of America, have agreed upon the following articles, to-wit:

ARTICLE I

A. Where the name of a State is used in this Compact, as a party thereto, it shall be construed to include the individuals, corporations, partnerships, associations, districts, administrative departments, bureaus, political subdivisions, agencies, persons, permittees, appropriators and all others using, claiming, or in any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State.

B. Any individual, corporation, partnership, association, district, administrative department, bureau, political subdivision, agency, person, permittee, or appropriator authorized by or under the laws of a signatory State, and all others using, claiming, or in

any manner asserting any right to the use of the waters of the Yellowstone River System under the authority of said State, shall be subject to the terms of this Compact. Where the singular is used in this article, it shall be construed to include the plural.

ARTICLE II

A. The State of Montana, the State of North Dakota, and the State of Wyoming are hereinafter designated as "Montana," "North Dakota," and "Wyoming," respectively.

B. The terms "Commission" and "Yellowstone River Compact Commission" mean the agency created as provided herein for the administration of this Compact.

C. The term "Yellowstone River Basin" means areas in Wyoming, Montana, and North Dakota drained by the Yellowstone River and its tributaries, and includes the area in Montana known as Lake Basin, but excludes those lands lying within Yellowstone National Park.

D. The term "Yellowstone River System" means the Yellowstone River and all of its tributaries, including springs and swamps, from their sources to the mouth of the Yellowstone River near Buford, North Dakota, except those portions thereof which are within or contribute to the flow of streams within the Yellowstone National Park.

E. The term "Tributary" means any stream which in a natural state contributes to the flow of the Yellowstone River, including interstate tributaries and tributaries thereof, but excluding those which are within or contribute to the flow of streams within the Yellowstone National Park.

F. The term "Interstate Tributaries" means the Clarks Fork, Yellowstone River; the Bighorn River (except the Little Bighorn River); the Tongue River; and the Powder River, whose confluences with the Yellowstone River are respectively at or near the city (or town) of Laurel, Big Horn, Miles City, and Terry, all in the State of Montana.

G. The terms "Divert" and "Diversion" mean the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken.

H. The term "Beneficial Use" is herein defined to be that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man.

I. The term "Domestic Use" shall mean the use of water by an individual, or by a family unit or household for drinking, cooking, laundering, sanitation and other personal comforts and necessities; and for the irrigation of a family garden or orchard not exceeding one-half acre in area.

J. The term "Stock Water Use" shall mean the use of water for livestock and poultry.

ARTICLE III

A. It is considered that no Commission or administrative body is necessary to administer this Compact or divide the waters of the Yellowstone River Basin as between the States of Montana and North Dakota. The provisions of this Compact, as between the States of Wyoming and Montana, shall be administered by a Commission composed of one representative from the State of Wyoming and one

representative from the State of Montana, to be selected by the Governors of said States as such States may choose, and one representative selected by the Director of the United States Geological Survey or whatever Federal agency may succeed to the functions and duties of that agency, to be appointed by him at the request of the States to sit with the Commission and who shall, when present, act as Chairman of the Commission without vote, except as herein provided.

B. The salaries and necessary expenses of each State representative shall be paid by the respective State; all other expenses incident to the administration of this Compact not borne by the United States shall be allocated to and borne one-half by the State of Wyoming and one-half by the State of Montana.

C. In addition to other powers and duties herein conferred-upon the Commission and the members thereof, the jurisdiction of the Commission shall include the collection, correlation, and presentation of factual data, the maintenance of records having a bearing upon the administration of this Compact, and recommendations to such States upon matters connected with the administration of this Compact, and the Commission may employ such services and make such expenditures as reasonable and necessary within the limit of funds provided for that purpose by the respective States, and shall compile a report for each year ending September 30 and transmit it to the Governors of the signatory States on or before December 31 of each year.

D. The Secretary of the Army; the Secretary of the Interior; the Secretary of Agriculture; the Chairman, Federal Power Commission; the Secretary of Commerce, or comparable officers of whatever

Federal agencies may succeed to the functions and duties of these agencies, and such other Federal officers and officers of appropriate agencies, of the signatory States having services or data useful or necessary to the Compact Commission, shall cooperate, ex-officio, with the Commission in the execution of its duty in the collection, correlation, and publication of records and data necessary for the proper administration of the Compact; and these officers may perform such other services related to the Compact as may be mutually agreed upon with the Commission.

E. The Commission shall have power to formulate rules and regulations and to perform any act which they may find necessary to carry out the provisions of this Compact, and to amend such rules and regulations. All such rules and regulations shall be filed in the office of the State Engineer of each of the signatory States for public inspection.

F. In case of the failure of the representatives of Wyoming and Montana to unanimously agree on any matter necessary to the proper administration of this Compact, then the member selected by the Director of the United States Geological Survey shall have the right to vote upon the matters in disagreement and such points of disagreement shall then be decided by a majority vote of the representatives of the States of Wyoming and Montana and said member selected by the Director of the United States Geological Survey, each being entitled to one vote.

G. The Commission herein authorized shall have power to sue and be sued in its official capacity in any Federal Court of the signatory States, and may adopt and use an official seal which shall be judicially noticed.

ARTICLE IV

The Commission shall itself, or in conjunction with other responsible agencies, cause to be established, maintained, and operated such suitable water gaging and evaporation stations as it finds necessary in connection with its duties.

ARTICLE V

A. Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

B. Of the unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of January 1, 1950, there is allocated to each signatory State such quantity of that water as shall be necessary to provide supplemental water supplies for the rights described in paragraph A of this Article V, such supplemental rights to be acquired and enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation, and the remainder of the unused and unappropriated water is allocated to each State for storage or direct diversions for beneficial use on new lands or for other purposes as follows:

1. Clarks Fork, Yellowstone River

   a. To Wyoming..... 60%
      To Montana..... 40%

   b. The point of measurement shall be below the last diversion from Clarks Fork above Rock Creek.

2. Bighorn River (Exclusive of Little Bighorn River)

   a. To Wyoming 80%
      To Montana 20%

   b. The point of measurement shall be below the last diversion from the Bighorn River above its junction with the Yellowstone River, and the inflow of the Little Bighorn River shall be excluded from the quantity of water subject to allocation.

3. Tongue River

   a. To Wyoming 40%
      To Montana 60%

   b. The point of measurement shall be below the last diversion from the Tongue River above its junction with the Yellowstone River.

4. Powder River (Including the Little Powder River)

   a. To Wyoming 42%
      To Montana 58%

   b. The point of measurement shall be below the last diversion from the Powder River above its junction with the Yellowstone River.

C. The quantity of water subject to the percentage allocations, in Paragraph B 1, 2, 3, and 4 of this Article V, shall be determined on an annual water year basis measured from October 1st of any year through September 30th of the succeeding year. The quantity to which the percentage factors shall be applied through a given date in any water year shall be, in acre-feet, equal to the algebraic sum of:

1. The total diversions, in acre-feet, above the point of measurement, for irrigation, municipal, and industrial uses in Wyoming and Montana

developed after January 1, 1950, during the period from October 1st to that given date;

2. The net change in storage, in acre-feet, in all reservoirs in Wyoming and Montana above the point of measurement completed subsequent to January 1, 1950, during the period from October 1st to that given date;

3. The net change in storage, in acre-feet, in existing reservoirs in Wyoming and Montana above the point of measurement, which is used for irrigation, municipal, and industrial purposes developed after January 1, 1950, during the period October 1st to that given date:

4. The quantity of water, in acre-feet, that passed the point of measurement in the stream during the period from October 1st to that given date.

D. All existing rights to the beneficial use of waters of the Yellowstone River in the States of Montana and North Dakota, below Intake, Montana, valid under the laws of these States as of January 1, 1950, are hereby recognized and shall be and remain unimpaired by this Compact. During the period May 1 to September 30, inclusive, of each year, lands within Montana and North Dakota shall be entitled to the beneficial use of the flow of waters of the Yellowstone River below Intake, Montana, on a proportionate basis of acreage irrigated. Waters of tributary streams, having their origin in either Montana or North Dakota, situated entirely in said respective States and flowing into the Yellowstone River below Intake, Montana, are allotted to the respective States in which situated.

E. There are hereby excluded from the provisions of this Compact:

1. Existing and future domestic and stock water uses of water: *Provided*, That the capacity of any reservoir for stock water so excluded shall not exceed 20 acre-feet;

2. Devices and facilities for the control and regulation of surface waters.

F. From time to time the Commission shall re-examine the allocations herein made and upon unanimous agreement may recommend modifications therein as are fair, just, and equitable, giving consideration among other factors to:

Priorities of water rights;
Acreage irrigated;
Acreage irrigable under existing works; and
Potentially irrigable lands.

ARTICLE VI

Nothing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.

ARTICLE VII

A. A lower signatory State shall have the right, by compliance with the laws of an upper signatory State, except as to legislative-consent, to file application for and receive permits to appropriate and use any waters in the Yellowstone River System not specifically apportioned to or appropriated by such upper State as provided in Article V; and to construct or participate in the construction and use of any dam,

storage reservoir, or diversion works in such upper State for the purpose of conserving and regulating water that may be apportioned to or appropriated by the lower State: *Provided*, That such right is subject to the rights of the upper State to control, regulate, and use the water apportioned to and appropriated by it: *And, provided further*, That should an upper State elect, it may share in the use of any such facilities constructed by a lower State to the extent of its reasonable needs upon assuming or guaranteeing payment of its proportionate share of the cost of the construction, operation, and maintenance. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

B. Each claim hereafter initiated for an appropriation of water in one signatory State for use in another signatory State shall be filed in the Office of the State Engineer of the signatory State in which the water is to be diverted, and a duplicate copy of the application or notice shall be filed in the office of the State Engineer of the signatory State in which the water is to be used.

C. Appropriations may hereafter be adjudicated in the State in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory State, such adjudications shall be confirmed in that State by the proper authority. Each adjudication is to conform with the laws of the State where the water is diverted and shall be recorded in the County and State where the water is used.

D. The use of water allocated under Article V of this Compact for projects constructed after the date of this Compact by the United States of America or

any of its agencies or instrumentalities, shall be charged as a use by the State in which the use is made: *Provided*, That such use incident to the diversion, impounding, or conveyance of water in one State for use in another shall be charged to such latter State.

ARTICLE VIII

A lower signatory State shall have the right to acquire in an upper State by purchase, or through exercise of the power of eminent domain, such lands, easements, and rights-of-way for the construction, operation, and maintenance of pumping plants, storage reservoirs, canals, conduits, and appurtenant works as may be required for the enjoyment of the privileges granted herein to such lower State. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

ARTICLE IX

Should any facilities be constructed by a lower signatory State in an upper signatory State under the provisions of Article VII, the construction, operation, repairs, and replacements of such facilities shall be subject to the laws of the upper State. This provision shall apply with equal force and effect to an upper State in the circumstance of the necessity of the acquisition of rights by an upper State in a lower State.

ARTICLE X

No water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States. In the event water from another

river basin shall be imported into the Yellowstone River Basin or transferred from one tributary basin to another by the United States of America, Montana, North Dakota, or Wyoming, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefore in determining its share of the water apportioned in accordance with Article V herein.

ARTICLE XI

The provisions of this Compact shall remain in full force and effect until amended in the same manner as it is required to be ratified to become operative as provided in Article XV.

ARTICLE XII

This Compact may be terminated at any time by unanimous consent of the signatory States, and upon such termination all rights then established hereunder shall continue unimpaired.

ARTICLE XIII

Nothing in this Compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, in any Federal Court or the United States Supreme Court, for the protection of any right under this Compact or the enforcement of any of its provisions.

ARTICLE XIV

The physical and other conditions characteristic of the Yellowstone River and peculiar to the territory drained and served thereby and to the development thereof, have actuated the signatory States in the consummation of this Compact, and none of them, nor the United States of America by its consent and

approval, concedes thereby the establishment of any general principle or precedent with respect to other interstate streams.

ARTICLE XV

This Compact shall become operative when approved by the Legislature of each of the signatory States and consented to and approved by the Congress of the United States.

ARTICLE XVI

Nothing in this Compact shall be deemed:

(a) To impair or affect the sovereignty or jurisdiction of the United States of America in or over the area of waters affected by such compact, any rights or powers of the United States of America, its agencies, or instrumentalities, in and to the use of the waters of the Yellowstone River Basin nor its capacity to acquire rights in and to the use of said waters;

(b) To subject any property of the United States of America, its agencies, or instrumentalities to taxation by any State or subdivision thereof, nor to create an obligation on the part of the United States of America, its agencies, or instrumentalities, by reason of the acquisition, construction, or operation of any property or works of whatsoever kind, to make any payments to any State or political subdivision thereof, State agency, municipality, or entity whatsoever in reimbursement for the loss of taxes;

(c) To subject any property of the United States of America, its agencies, or instrumentalities, to the laws of any State to an extent other than the extent to which these laws would apply without regard to the Compact.

ARTICLE XVII

Should a Court of competent jurisdiction hold any part of this Compact to be contrary to the constitution of any signatory State or of the United States of America, all other severable provisions of this Compact shall continue in full force and effect.

ARTICLE XVIII

No sentence, phrase, or clause in this Compact or in any provision thereof, shall be construed or interpreted to divest any signatory State or any of the agencies or officers of such States of the jurisdiction of the water of each State as apportioned in this Compact.

IN WITNESS WHEREOF, the Commissioners have signed this Compact in quadruplicate original, one of which shall be filed in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each signatory State.

Done at the City of Billings in the State of Montana, this 8th day of December, in the year of our Lord, One Thousand Nine Hundred and Fifty.

Commissioners for the State of Montana:

FRED E. BUCK	P. F. LEONARD
A. W. BRADSHAW	WALTER M. MCLAUGHLIN
H. W. BUNSTON	DAVE M. MANNING
JOHN HERZOG	JOSEPH MUGGLI
JOHN M. JARUSSI	CHESTER E. ONSTAD
ASHTON JONES	ED F. PARRIOTT
CHRIS. JOSEPHSON	R. R. RENNE
A. WALLACE KINGSBURY	KEITH W. TROUT

Commissioners for the State of North Dakota:

I. A. ACKER	J. J. WALSH
EINAR H. DAHL	

Commissioners for the State of Wyoming:

L. C. BISHOP	N. V. KURTZ
EARL T. BOWER	HARRY L. LITTLEFIELD
J. HAROLD CASH	R. E. McNALLY
BEN F. COCHRANE	WILL G. METZ
ERNEST J. GOPPERT	MARK N. PARTRIDGE
RICHARD L. GREENE	ALONZO R. SHREVE
E. C. GWILLIM	CHARLES M. SMITH
E. J. JOHNSON	LEONARD F. THORNTON
LEE E. KEITH	M. B. WALKER

I have participated in the negotiation of this Compact and intend to report favorably thereon to the Congress of the United States.

R. J. NEWELL
Representative of the United States of America

APPENDIX B

Proposed Order

STATE OF MONTANA

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA

No. 137 Original

_____, 2010

ORDER

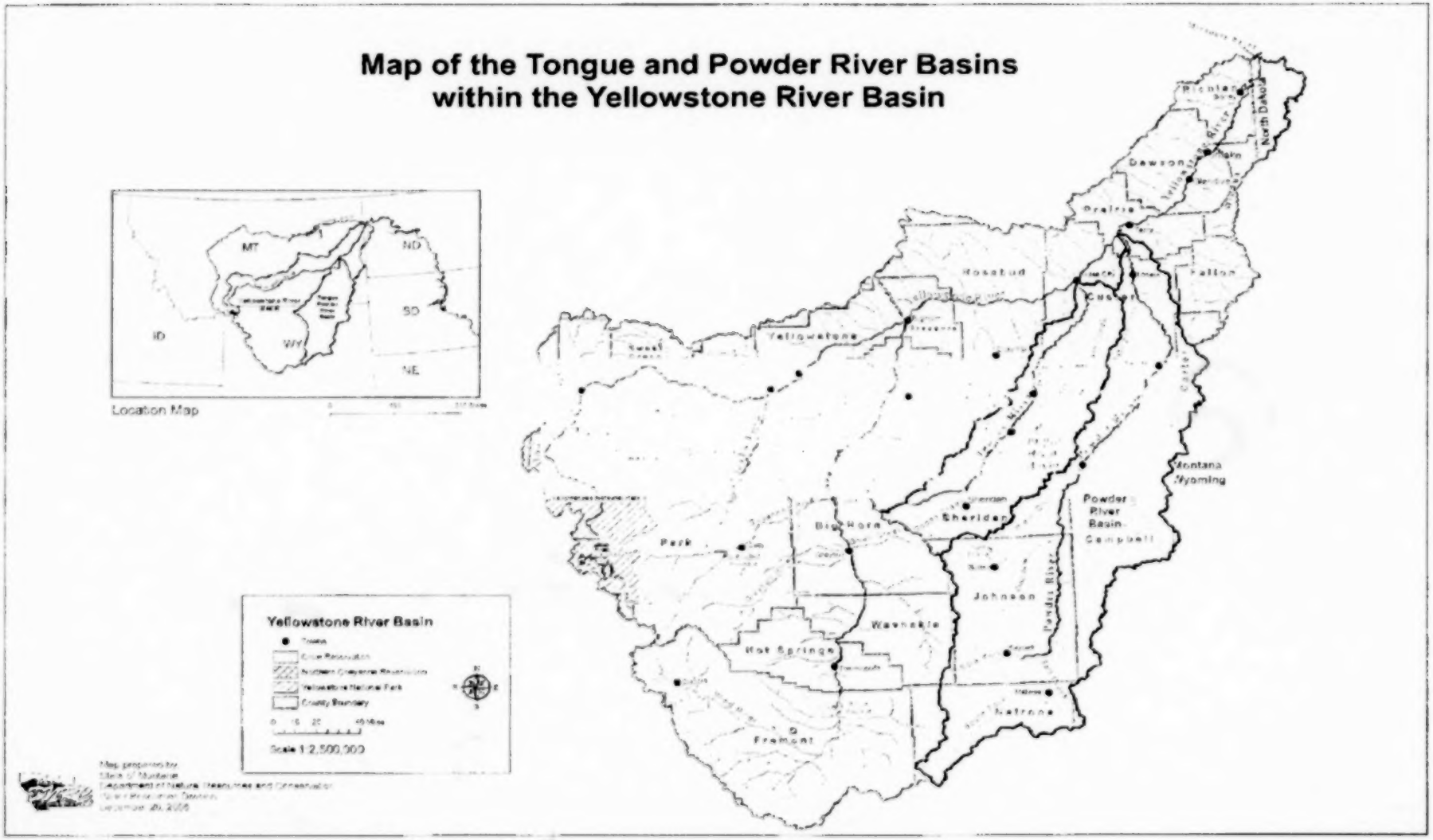
Having considered the briefs of the parties and amicus curiae in support of, opposition to, or otherwise relating to the Motion to Dismiss filed in this action by the State of Wyoming (dated April 2008), the Motion for Partial Summary Judgment filed in this action by the State of Montana (dated October 16, 2009), and the Motion to Intervene filed in this action by Anadarko Petroleum Corporation (dated July 17, 2009), and having received and considered the First Interim Report of the Special Master heretofore appointed by the Court, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The Motion to Dismiss of the State of Wyoming is DENIED.

2. The Motion for Partial Summary Judgment of the State of Montana is GRANTED IN PART AND DENIED IN PART WITHOUT PREJUDICE. The Motion for Partial Summary Judgment is granted as to the coverage of Article V(A) of the Yellowstone River Compact. Article V(A) applies to all surface

waters tributary to the Tongue and Powder Rivers (with the exception of the explicit exclusions set out in Article V(E) of the Compact). The Motion for Partial Summary Judgment is denied as to the applicability of Article V(B) and other provisions of the Compact to surface waters tributary to the Tongue and Powder Rivers, without prejudice to the motion being renewed at a later point in time upon showing that the issue is within the legitimate scope of the State of Montana's Bill of Complaint and relevant to the ultimate decision and decree in this case.

3. The Motion to Intervene of Anadarko Petroleum Corporation is DENIED.


Map of the Tongue and Powder River Basins
within the Yellowstone River Basin
MT
ND
SD
WY
NE
ID
Location Map
Yellowstone River Basin
Scale 1:2,500,000
Dawson
Prairie
Fallon
Rosebud
Yellowstone
Sheridan
Big Horn
Park
Johnson
Powder River Basin
Campbell
Montana
Wyoming
Powder River
Wasnakie
Hot Springs
Natrona
Fremont

No. 137, Original

In The
Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

On Exceptions To
The First Interim Report
Of The Special Master

BRIEF OF AMICUS CURIAE NORTHERN CHEYENNE TRIBE IN SUPPORT OF MONTANA'S EXCEPTIONS

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INTEREST OF AMICUS[1]

The Northern Cheyenne Tribe files this amicus brief in support of Montana's Exceptions to the First Interim Report of the Special Master. The Northern Cheyenne Tribe is a federally recognized Indian tribe,[2] occupying a 444,000 acre reservation along the Tongue River in southeastern Montana. The Tongue River is one of the interstate tributaries of the Yellowstone River addressed in the Yellowstone Compact and is at issue in this case. The Tribe previously filed an amicus brief in opposition to Wyoming's motion to dismiss.

The Tongue River is the eastern boundary of the Northern Cheyenne Reservation and serves as the main source of the Northern Cheyenne Tribe's water rights for its reservation lands. Lands along both sides of the Tongue River were initially withdrawn for the Tribe in 1881. The Northern Cheyenne Reservation was formally established by Executive Order in 1884 and was extended to the "middle of the channel

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[1] No person or entity other than amicus authored any portion of this brief or made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties have consented to the filing of this brief, and the letters of consent are being filed with the Clerk simultaneously with this amicus brief.

[2] *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 74 Fed. Reg. 40218, 40220 (August 11, 2009).

of the Tongue River" in 1900.[3] As the result of the withdrawal of lands in 1881, and the subsequent establishment of the Tribe's Reservation in 1884 and 1910, water was reserved by and for the Northern Cheyenne Tribe. *See Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546, 595-96 (1963).

The Tribe's Indian reserved water rights or *Winters* rights, including its rights in the Tongue River, were resolved pursuant to a Compact with the State of Montana, which was ratified and approved by the Montana Legislature in 1991, MCA 85-20-301, and by the Congress in the Northern Cheyenne Indian Reserved Water Rights Settlement Act of 1992, Pub. L. 102-374, 106 Stat. 1186 (1992). The Compact was subsequently entered as a decree by the Montana Water Court in 1995. *In the Matter of the Adjudication of Existing and Reserved Right to the Use of Water, Both Surface and Underground, of the Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation Within the State of Montana in Basins 42A, 42B, 42K-J, & 43P* (Water Court of the State of Montana, Yellowstone River Division, Special

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[3] Executive Orders of November 26, 1884 and March 19, 1900, 5 *Indian Affairs: Laws and Treaties* 860-61 (Charles J. Kappler, ed., Government Printing Office, 1904). The boundaries of the Reservation, and the Tribe's ownership of and title to the lands within the boundaries were ratified and confirmed by section 1 of the Northern Cheyenne Allotment Act, Act of June 3, 1926, 44 Stat. 1690. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 (1976).

Northern Cheyenne Compact SubBasin), *decree entered* September 26, 1995.

Under the Northern Cheyenne-Montana Compact, the Northern Cheyenne Tribe has the right to 32,500 acre feet of water in the Tongue River from a combination of direct flow, storage from the Tongue River Reservoir and exchange water, and a separate contract right for 7,500 acre feet of Tongue River Reservoir storage water.[4] In the Compact, the Tribe agreed not to use its Tongue River direct flow right in a manner that impacts certain main stem state water rights with a priority before 1909, and pre-1973 state water rights off the reservation on tributaries to the Tongue River. Article II.A.2.s.ii, MCA 85-20-231.

The Yellowstone River Compact, Pub. L. 82-231, 6 Stat. 663 (1951) provides in Article VI that:

> Nothing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of the waters of the Yellowstone River and its tributaries owned by or for Indians, Indian tribes, and their reservations.

---

[4] The Tribe also has water rights in Rosebud Creek, a Montana tributary to the Yellowstone River, and 30,000 acre-feet of storage in Big Horn Reservoir, located on the Big Horn River, one of the four interstate tributaries addressed in the Yellowstone Compact. None of these water sources is at issue in the present matter.

Nevertheless, given the nature of the Tribe's water rights under the Northern Cheyenne-Montana Compact, the outcome of this case has the potential for impacting the manner in which the Tribe can use its water rights. Thus the Tribe has an interest in ensuring that its water rights are fully protected under the Yellowstone Compact, and that the Compact is not interpreted in a manner that adversely affects the Tribe's rights.

ARGUMENT

I. The Special Master's Decision Allowing Increased Consumption for Pre-1950 Rights is Inconsistent with the Compact

The Northern Cheyenne Tribe supports the State of Montana's position that Article V.A of the Yellowstone Compact ("Compact") provides protection only for the depletions or consumptive use existing as of 1950 on irrigated lands in Wyoming. This position is supported by the language of Article V and the overall structure of the Compact.

Under Article V of the Compact, a three-tier system of water rights is established. Article V.A provides that "appropriative rights to the beneficial uses of water . . . existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." "Beneficial Use" is defined under Article II.H as "that

use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Article V.B then allocates the "unused and unappropriated waters of the Interstate tributaries of the Yellowstone River as of June 1, 1950" first to supplemental water for pre-1950 rights, and then to new uses after 1950. Thus, under the structure of Article V, together with the definition of beneficial use in Article II.H, the "depletions" of water from beneficial uses as of January 1, 1950 are "to continue to be enjoyed" and are protected as the first-tier water rights as the permanent baseline condition.

We agree with Montana that this structure does not allow for protection for increased depletions or consumptive use as a result of increased irrigation efficiencies. Rather, the additional consumption is a new use not protected by the Compact, and is water that is subject to the allocation under Article V.B. In addition to the reasons set out in Montana's brief, this interpretation is further supported when considered with reference to the definition of "Divert" and "Diversion" in Article II.G of the Compact.

Article II.G defines "Divert" and "Diversion" as "the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or the tributary from which it is taken." This definition reinforces the structure of the compact as one incorporating the concept of consumption and depletion in the protections afforded to Montana's pre-1950 uses.

Therefore, when the Special Master framed the question as "whether the Compact restricts pre-1950 Wyoming appropriators to the amounts of water that they were *consuming* rather than *diverting* as of January 1, 1950," First Interim Report at 64, it is not clear there is a difference under the definition of diversion in Article II.G as water taken from the stream and not returned, i.e. consumed. Given the clear definition of the term "diversion" in the Compact, the restrictions on Wyoming's pre-1950 rights must be determined with reference to the amount of water taken from the stream and not returned.

Further, the Special Master found it informative that the apportionment in Article V.B of the Compact is based on "divertible flow" rather than consumptive use. *Id.* While the divertible flow concept has no application to the rights protected under Article V.A, and the term is not used in the Compact, in the context of Article V.B, "divertible flow" would be determined with reference to the definition in Article II.G – the amount of water not returned to the river or tributary from which it is taken.

Finally, the Special Master considered issues of practicality in his analysis, noting that Wyoming would need to establish administration measures to track increases in consumption by pre-1950 appropriators. First Interim Report at 87. However, no additional type of administration to monitor consumptive use would be required that is not already required under the apportionment in Article V.B. The allocations in Article V.B "take into account return

flows and uses of them, as well as original runoff." S. Rep. No. 883, 82nd Cong. 1st Sess., Joint App. at 13. If such administration can be undertaken to track return flows and uses of them, as well as original runoff for purposes of Article V.B, it does not seem to be a significantly greater burden to undertake the same type of administration for purposes of Article V.A.

II. Policy Considerations Relating to Water Conservation Do Not Support the Master's Conclusion

The First Interim Report correctly states that: "When a water user increases its water efficiency and thus its consumption, the change can reduce the amount of water that flows back into the waterway and is available for downstream water users – even though the amount that is diverted does not increase." First Interim Report at 55. Downstream water users often rely on return flows from irrigation upstream. Particularly at the end of the irrigation season in southeast Montana, it is not unusual that the only water available is from return flows. Indeed, the use of return flows is a fundamental aspect of the doctrine of prior appropriation. Therefore a reduction in the amount of return flows would have a definite and very significant impact on available water to fulfill pre-1950 rights in Montana.

The Special Master concludes that "While the rule [that the Compact does not ban increased consumption on existing acreage as a result of improved

efficiencies] reduces the security of downstream appropriators who rely on return flow, it also encourages increased conservation (a goal that both Wyoming and Montana, like most western states, share) by giving farmers an incentive that they otherwise would not have to invest in improved irrigation techniques." First Interim Report at 87. Thus, under the Master's analysis, the policy consideration of encouraging increased conservation on Wyoming acreage balances the reduction of flows to pre-1950 Montana water users downstream.

The idea that increased efficiency allowing for more water to be consumed on the same land is not a usual conservation measure, however, in the sense that it does not result in less depletion of the resource. While increased irrigation efficiency may benefit an individual water user, it does not result in overall conservation of the resource. Instead, it results in a greater consumption of water by the individual user, and less water or no water being made available for downstream pre-1950 rights. Conservation policies that aim to reduce depletions of the resource would not likely encourage this result. Indeed, it is an equally important conservation goal to encourage the multiple use of water. "Maximizing the number and extent of uses promotes efficiency," and "[r]ecapture and reuse of water encourages conservation and maximum utilization of water." David H. Getches, Water Law in a Nutshell (Thomson/West 2009) at 139.

However, no one suggests that efficiency should be discouraged – only that if improved irrigation techniques are put into place, the resulting increased consumption should not be allowed to unilaterally change Montana's allocation under the Compact, or transfer that use to Wyoming to the detriment of Montana.

CONCLUSION

The Special Master's recommendations should be adopted by the Court with the exception of the recommendation that increased consumption due to improved irrigation efficiencies on lands under pre-1950 water rights is allowed under the Compact, and with the exception of the recommendation that exhaustion of intrastate remedies is required before Wyoming's obligations under the Compact become operative.

Respectfully submitted,

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Northern Cheyenne Tribe

May 2010

No. 137, Original

In the Supreme Court of the United States

STATE OF MONTANA, PLAINTIFF

v.

STATE OF WYOMING AND STATE OF NORTH DAKOTA

ON EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE OPPOSING PLAINTIFF'S EXCEPTION

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QUESTIONS PRESENTED

In this case Montana alleges that Wyoming has breached the Yellowstone River Compact (Compact) by consuming more water than is permitted under the Compact, in four specific respects. Wyoming has moved to dismiss the bill of complaint. The Special Master has recommended that Wyoming's motion to dismiss be denied and concluded that three of Montana's theories state a claim of Compact breach, to the extent that Montana can show that Wyoming's use of the practices alleged have left pre-1950 users in Montana without enough water and without any recourse under Montana law. The Special Master concluded, however, that Montana's fourth theory fails to state a claim. That theory alleges that certain users in Wyoming are diverting the same amount of water as they did before the Compact, but consuming more of those diversions through increased efficiencies, so that less water returns to the river and is available for use downstream in Montana. The questions presented by Montana's exception are as follows:

1. Whether the Special Master correctly concluded that Montana's increased-efficiency allegation does not state a claim for breach of the Compact.

2. Whether the Special Master correctly concluded that, to show that Wyoming has breached the Compact and caused Montana injury, Montana must show that its water users lack an intrastate remedy under Montana law.

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Art. V, 65 Stat. 666 ..... 2, 4, 11
Art. V(A), 65 Stat. 666 ..... *passim*
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H.R. Rep. No. 1118, 82d Cong., 1st Sess. (1951) 13, 27

Terry A. Howell, *Drops of Life in the History of Irrigation*, Irrigation J., Jan. 1, 2000 28

Wells A. Hutchins, *U.S. Dep't of Agric., Misc. Pub. No. 418, Selected Problems in the Law of Water Rights in the West* (1942) 30

1 Wells A. Hutchins et al., *U.S. Dep't of Agric., Misc. Pub. No. 1206, Water Rights Laws in the Nineteen Western States* (1971) 21, 22

2 Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights* (2d ed. 1912) ... 18, 20, 21, 22, 23

Robert M. Morgan, *Water and the Land* (1993) 28

S. Rep. No. 883, 82d Cong., 1st Sess. (1951) ... 13, 26 27, 28

Al Stone, *Montana*, in 4 *Waters and Water Rights*, Pt. XI, Subpt. B (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009) 13

1 Samuel C. Wiel, *Water Rights in the Western States* (3d ed. 1911) 21

In the Supreme Court of the United States

No. 137, Original

STATE OF MONTANA, PLAINTIFF

v.

STATE OF WYOMING AND STATE OF NORTH DAKOTA

ON EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE OPPOSING PLAINTIFF'S EXCEPTION

INTEREST OF THE UNITED STATES

Wyoming's motion to dismiss presents several questions concerning the Yellowstone River Compact, an interstate agreement negotiated with federal participation, approved by Congress, and possessing the status of federal law. The United States administers water projects throughout the Yellowstone River Basin that may be affected by the Court's construction of the Compact. Pursuant to *Winters* v. *United States*, 207 U.S. 564 (1908), the United States also holds certain rights to waters of the Yellowstone River system in trust for the Indian Tribes whose reservations lie in the river basin. At the Court's invitation, the United States filed a brief addressing Montana's motion for leave to file a bill of complaint. The United States also filed a brief addressing Wyoming's motion to dismiss, which was referred to

the Special Master, and presented both written and oral submissions in the proceedings before the Special Master.

STATEMENT

This Court granted Montana leave to file a bill of complaint alleging that Wyoming has breached the Yellowstone River Compact (Compact) in four respects. The Court also invited Wyoming to file a motion to dismiss, which the Court referred to Special Master Barton H. Thompson, Jr. The Special Master has recommended that the Court deny Wyoming's motion in nearly all respects. Wyoming has not excepted to that recommendation. Montana, however, has excepted to two portions of the First Interim Report of the Special Master (Report).

1. The Compact is an agreement among Wyoming, Montana, and North Dakota. See Act of Oct. 30, 1951, ch. 629, 65 Stat. 663 (approving and reprinting the Compact).[1] The Compact allocates the water supply of the Yellowstone River system among those States. Art. V, 65 Stat. 666. Montana alleges that Wyoming has breached the Compact by taking water to which Montana is entitled from the Tongue and Powder Rivers, tributaries of the Yellowstone that flow from Wyoming into Montana. Compl. ¶¶ 9-13; Br. in Supp. of Compl. 19.

The Yellowstone River Basin is an approximately 70,100-square-mile watershed encompassing parts of Wyoming, Montana, and North Dakota. The mainstem of the Yellowstone River rises in the Wyoming portion of Yellowstone National Park, flows north into Montana, crosses Montana in a northeasterly direction, and joins the Missouri River just after crossing the border into North Dakota.

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[1] The text of the Compact is set out in Appendix A to the Report.

This litigation involves the Tongue and Powder Rivers, tributaries of the Yellowstone that rise in Wyoming's Bighorn Mountains and cross into Montana to join the Yellowstone mainstem. The principal use of water diverted from both tributaries is for irrigation within Wyoming and Montana. The Tongue River serves as the primary water source for the Northern Cheyenne Indian Reservation, which is in south-central Montana adjacent to the river.

In addition to the Tongue and Powder Rivers, the Compact also regulates two other interstate tributaries of the Yellowstone: the Bighorn River (except for its tributary the Little Bighorn River) and the Clarks Fork Yellowstone River. Art. II(F), 65 Stat. 665. Although no compact violation is alleged regarding the Bighorn or Clarks Fork Yellowstone, the water rights and administration in those river basins (including Indian water rights associated with the Crow Indian Reservation and the Wind River Reservation) may be affected by any interpretation of the Compact in this litigation.[2]

2. The Compact is the product of nearly 20 years of intermittent negotiations, authorized by Congress with the goal of reaching "an equitable division and apportionment * * * of the water supply of the Yellowstone River" and its tributaries. Act of June 2, 1949, ch. 166, 63 Stat. 153; Act of June 14, 1932, ch. 253, 47 Stat. 306; see Wyo. Br. in Supp. of Mot. to Dismiss 12-17; Mont. Br. in Resp. to Mot. to Dismiss 2-3. The three States reached agreement on December 8, 1950, and the resulting Compact was subsequently ratified by the state legislatures and approved by Congress in accordance with

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[2] Under the *Winters* doctrine, the United States holds reserved water rights in trust for the Tribes. See p. 1, *supra*.

the Compact Clause of the Constitution, Art. I, § 10, Cl. 3. See Act of Oct. 30, 1951, 65 Stat. 663.

In fulfillment of Congress's goal, the Compact provides for the division of the Yellowstone River Basin's water supply. The preamble declares that the Compact is intended to "remove all causes of present and future controversy between said States * * * with respect to the waters of the Yellowstone River and its tributaries, other than waters within or waters which contribute to the flow of streams within the Yellowstone National Park." 65 Stat. 663. The preamble further states that the parties "desire[] to provide for an equitable division and apportionment of such waters," and that they acknowledge that "the great importance of water for irrigation" shall be recognized "in future projects or programs for the regulation, control and use of water in the Yellowstone River Basin." *Ibid.* The Compact governs the waters of the entire Yellowstone River System, with principal focus on the waters of the four "Interstate Tributaries," *i.e.*, the Tongue, Powder, Clarks Fork Yellowstone, and Bighorn Rivers. Art. II(F), 65 Stat. 665.[3]

The operative provision at issue here, Article V, provides for the division of water between Montana and Wyoming according to a three-tiered framework. Article V(A) sets out the first tier: it provides that "[a]ppro-

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[3] Water for domestic use and (in moderate amounts) for watering livestock is excluded from the Compact altogether. Art. V(E), 65 Stat. 667. Indian water rights, too, are effectively excluded from the scope of the present dispute between Montana and Wyoming. Article VI provides that "[n]othing contained in this Compact shall be so construed or interpreted as to affect adversely any rights to the use of [Yellowstone River System waters] owned by or for Indians." 65 Stat. 668; see also U.S. Invitation Br. 8 n.3 (explaining possible implications for the Northern Cheyenne).

priative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." 65 Stat. 666. The doctrine of appropriation generally provides that a person who diverts water and puts it to a beneficial use retains the right to use that water, on a "first in time, first in right" basis, although only to the extent the water is reasonably required and actually used. See, *e.g.*, *Arizona* v. *California*, 298 U.S. 558, 565-566 (1936); p. 18, *infra*.

Article V(B) sets out the second and third tiers. 65 Stat. 666. Of the water of the interstate tributaries that is "unused and unappropriated" as of January 1, 1950, the second-tier allocation permits each State to divert water necessary to supplement its first-tier rights. Those supplemental rights, too, are to be acquired and used pursuant to the doctrine of appropriation. *Ibid.* The third-tier allocation gives each State a specified percentage of any remaining "unused and unappropriated" water in each of the four interstate tributaries. Art. V(B), 65 Stat. 666-667. The quantities of water available to third-tier uses in each river, and the amounts actually diverted by each State, are to be calculated annually. Art. V(C), 65 Stat. 667.

The Compact creates a Yellowstone River Compact Commission to administer the Compact as between Montana and Wyoming. (North Dakota does not participate in the Commission.) The Commission includes one representative from each of the two States and a federally appointed chairman, who has no vote except in case of tie votes on certain core matters. Art. III(A) and (F),

65 Stat. 665, 666. Historically the Commission has not served as a forum for resolving water-rights disputes.

3. Montana alleges that in some recent years, there has been insufficient water available in the Powder and Tongue Rivers to satisfy pre-1950 water rights in Montana under the Compact's first tier. Compl. ¶¶ 14-16; Br. in Supp. of Compl. 14, 17. Montana further alleges that while it has been short of water even for pre-1950 uses, Wyoming has permitted upstream diversions from these two interstate tributaries to *post*-1950 uses. Montana contends that when Montana's first-tier rights are not satisfied, there is no "unused and unappropriated" water to be allocated between the States pursuant to the Compact's second and third tiers, and that in those circumstances diversions in Wyoming for post-1950 uses violate the Compact.

Montana has specified four categories into which the allegedly impermissible diversions to post-1950 uses fall. In the allegation relevant here, Montana contends that some Wyoming water users who hold pre-1950 rights are consuming more water than they did in 1950 by implementing new irrigation methods that result in less water making its way back to the stream in the form of return flows, even though the same amount of water is initially diverted from the stream, for the same use, on the same parcel of land, as in 1950. The water gains from increased efficiencies, Montana contends, are not within the scope of the pre-1950 water rights protected by Article V(A) of the Compact, and so must yield to Montana's pre-1950 rights. Compl. ¶ 12; Mont. Br. in Supp. of Exception 3-4 (Mont. Exception Br.); Br. in Supp. of Compl. 15-16. Montana's three other theories of Compact breach involve alleged interference with Montana's pre-1950 rights through use of new storage

reservoirs, irrigation of new acreage, and reduction of flows in the Tongue and Powder Rivers caused by groundwater pumping in Wyoming. Compl. ¶¶ 9-11.

4. This Court granted Montana leave to file its complaint, and invited Wyoming to submit the instant motion to dismiss. 552 U.S. 1175 (2008). The United States submitted a brief substantially agreeing with Montana and opposing the motion to dismiss, except with respect to the theory that increased efficiencies may amount to a Compact breach.

This Court referred the motion to dismiss and other matters to Special Master Thompson, 129 S. Ct. 480 (2008), who entertained oral argument and further briefing before submitting the Report that is the subject of Montana's exception.

5. The Special Master recommended that the motion to dismiss be denied. He agreed with Montana's interpretation of how the Compact protects pre-1950 rights against interference from post-1950 users, and he agreed that three of Montana's theories state a claim for breach of the Compact, as so interpreted. Wyoming has not excepted to any of those rulings.

a. The Special Master concluded, however, that Montana's increased-efficiency allegation failed to state a claim for breach of the Compact. Report 54-88, 90. That theory, the Special Master noted, "involve[d] a conflict between two sets of pre-1950 uses," unlike Montana's other theories. Report 56. Because the Compact negotiators decided not "to create a unitary system for regulating and administering pre-1950 appropriative rights," *ibid.*, Montana could not state a claim unless the Compact excluded these increased-efficiency gains from the scope of pre-1950 rights. The Special Master concluded that the Compact did not do so. Report 86-88, 90.

First, the Special Master noted that the Compact's language regulates the diversion of water to beneficial use, not the actual consumption of water net of return flows. Report 60-61. The Compact's definition of "beneficial use"—like the commonly understood meaning of that term in western water law—does not specify that the appropriative right is limited to the amount of water consumed; rather, the Special Master concluded, it permits any use that actually depletes a waterway to be the basis for an appropriative right. Report 61.

Second, the Special Master concluded that the "doctrine of appropriation," as referred to in Article V(A) of the Compact, did not preclude Wyoming from allowing its pre-1950 appropriators to retain the benefit of increased irrigation efficiencies. Report 64-85. The Special Master noted as an initial matter that ascertaining the content of that doctrine (as used in the Compact) would be difficult if the laws of Wyoming and Montana were to diverge on any relevant point, or if the law had materially changed since the Compact was adopted, but that "[t]hankfully," those issues were not presented because there was no conflict of law on these points. Report 39-40. Proceeding to examine that law, the Special Master concluded that Wyoming decisions "strongly indicate[d] that Wyoming appropriators are free to increase consumption on existing acreage through improved irrigation techniques"; that nothing in Montana law "contradict[ed] this rule," although "Montana law is ultimately inconclusive"; and that "[t]he appropriation law of other states does not suggest that Wyoming's rule is anomalous, although some courts might reach different results." Report 86.

The Special Master also noted that Wyoming's rule permitting water users to retain the benefits of their

improved efficiency is a reasonable one, because it "encourages increased conservation" by creating "an incentive * * * to invest in improved irrigation techniques." Report 87.

Finally, the Special Master observed that the significance of this issue is "inherently limited," because it applies only to efficiency gains that are realized and used on the same lands that were being irrigated as of January 1, 1950—not on new lands, or for new purposes. Report 87.

b. Separately, the Special Master observed that in continuing to litigate its other theories of Compact breach, "Montana may not always need to invoke Article V(A) to protect its pre-1950 uses," because "[w]here Montana can remedy the shortages of pre-1950 appropriators in Montana through purely intrastate means that do not prejudice its other rights under the Compact, an intrastate remedy is the appropriate solution." Report 27; see Report 89. The Special Master deferred consideration of "when 'intrastate' remedies are adequate" until after further factual development. Report 28.

SUMMARY OF ARGUMENT

A. The Special Master correctly concluded that the Compact does not override Wyoming's law of prior appropriation concerning increased irrigation efficiencies.

Significant improvements in irrigation techniques have enabled an irrigator to use the water he diverts more efficiently and thus to reduce the amount of water lost in the process of moving water from river to crops. Under Wyoming law, the irrigator can retain the benefit of that improved efficiency: he keeps the same priority date and flow rate for his diversion under the doctrine of

appropriation, because he is diverting the same amount of water from the river and using it on the same field for the same purpose. The only difference is that more of the diverted water actually reaches the fields to sustain the crops and less returns to the river as return flows.

Contrary to Montana's contentions, nothing in the Compact overrides that principle of Wyoming law. The text of the Compact does not require that state-law water rights protected by Article V(A) be limited to the amount of water that was actually consumed by crops in 1950; to the contrary, the text is consistent with the background principles of water law that treat the amount of water *diverted* for beneficial use as what matters. Nor does the Special Master's interpretation create any anomaly: it is simply a consequence of the Compact drafters' explicit decision to peg each State's rights under Article V(A) to the rights that water users in each State enjoyed under the doctrine of appropriation on January 1, 1950.

B. The Court need not resolve at this point the extent to which Montana may seek relief against Wyoming for breach of the Compact even when pre-1950 water uses in Montana have an intrastate remedy for any shortage. If the Court reaches the question, it should sustain the Special Master's conclusion that the unavailability of intrastate remedies is a prerequisite. Because of the way Article V(A) of the Compact is structured, Montana's rights under the Compact are derivative of its water users' rights. Where Montana's pre-1950 users already have recourse under state law to remedy any water shortage, Wyoming has caused them no injury and cannot be said to have breached the Compact.

ARGUMENT

The motion to dismiss should be resolved in accordance with the Special Master's recommendation. The Special Master correctly understood that the Compact provides enforceable protection to the pre-1950 water users in each State, but that to state a claim under the Compact for breach of that protection, Montana must show that its pre-1950 users are short of water and that Wyoming users caused the shortage by diverting water to post-1950 uses. Montana's theory based on increased irrigation efficiencies in Wyoming does not state a claim for breach of that protection, because Wyoming law permits a water user to increase the efficiency of an appropriation without "changing" the original water right or requiring a new water right, and Montana has not shown that the Compact overrides that principle of Wyoming law. Accordingly, as the Special Master concluded (and as Wyoming does not dispute), Montana should now go forward with seeking to prove its other three theories of breach.

I. THE COMPACT PROTECTS PRE-1950 USERS IN BOTH STATES FROM ENCROACHMENT BY POST-1950 USERS

Although Montana's exception focuses on the increased-efficiencies theory of a violation of Article V(A) of the Compact, illustrating why that exception should be overruled requires a discussion of the three different tiers of regulation set out by Article V. Both of Montana's areas of disagreement with the Special Master are premised on the notion that Article V(A) awards Montana a quantity of water, whereas the Special Master correctly understood that Article V(A)'s protection for the States is linked to particular water *rights* held by individual users.

As Montana has urged, as the Special Master correctly concluded, and as Wyoming no longer disputes,[1] Article V(A) provides enforceable protection to the water rights existing in both Wyoming and Montana as of January 1, 1950. See, *e.g.*, Mont. Exception Br. 17-18; Report 37; Mont. Br. in Resp. to Mot. to Dismiss 27-35. Those rights to water *already appropriated* are in the first tier of Compact protection; they take priority over the rights in the second and third tiers, *i.e.*, rights to the waters that were "unused and unappropriated * * * as of January 1, 1950." Compact Art. V(B), 65 Stat. 666. Thus, the Compact ensures that in times of shortage, downstream users in Montana who hold pre-1950 water rights are protected against interference by upstream users in Wyoming who hold only post-1950 water rights, or who exceed their pre-1950 water rights.

In affording its protection and allocation, however, the Compact divides water into only three categories: pre-1950 rights that already had full water supplies; pre-1950 rights that lacked a sufficient water supply and thus required a supplemental water right; and post-1950 rights. See Compact Art. V(A) and (B), 65 Stat. 666. The Compact did *not* subdivide the first category and give some pre-1950 users in one State priority over other pre-1950 users in the other State. See, *e.g.*, Mont. Exception Br. 33 (acknowledging that "the States intended to avoid interstate administration across state lines"); Report 32-34. Indeed, the negotiating history of

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[1] Wyoming has not filed exceptions arguing that the motion to dismiss should be granted in its entirety, and an order by this Court denying the motion to dismiss will be "subject to the general principles of finality and repose" throughout the remainder of this litigation. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 446 (1992) (quoting *Arizona* v. *California*, 460 U.S. 605, 619 (1983)).

the Compact shows that Wyoming resolutely opposed any such rule of interstate administration. See Special Master J.A. 67, 71 (Compact Commission meeting minutes).[5] Rather, as both the Secretary of the Interior and the federal representative to the Compact negotiations explained to Congress, "little could be gained, from a water supply standpoint, by attempting * * * the regulation and administration of existing appropriative rights in the signatory States." S. Rep. No. 883, 82d Cong., 1st Sess. 11 (1951) (Senate Report); accord *id.* at 6-7; H.R. Rep. No. 1118, 82d Cong., 1st Sess. 2 (1951) (House Report).

Thus, the Compact's first tier only protects pre-1950 water rights in one State against interference that is not authorized by a pre-1950 water right in the other State. The Compact drafters did not even attempt to quantify the first tier of protection by cataloguing the existing rights. Indeed, as the drafters recognized, that would have been an extraordinarily time-consuming and difficult task, given the state of recordkeeping at the time. See Special Master J.A. 232 (Engineering Committee letter, explaining that "[i]t would be a major research project to place existing rights in all States on an equivalent basis," because of "insufficient data" and "differences in the water laws of the States involved"). That was particularly so in Montana, which at the time of the Compact lacked a permit system for quantifying appropriative rights. See Report 22; see also, *e.g.*, Al Stone, *Montana* 1, in 4 *Waters and Water Rights*, Pt. XI, Subpt. B (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009) (Until 1973, "nearly all Montana water rights

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[5] "Special Master J.A." denotes the joint appendix submitted to the Special Master. See Report 3.

were either 'use rights' for which there were no records at all, or rights represented by posting and filing prior to commencing the appropriation works. There was no provision for filing a notice of completion, so there was no way of knowing how much water was actually diverted or put to a beneficial use, or even whether any water at all was ever appropriated.").

The drafters' decision not to quantify existing water rights confirms that the Compact's first tier protects those rights themselves, not a quantity of water computed by taking a snapshot of particular irrigation practices or crops irrigated under those rights at the time of the Compact. The drafters understood that Wyoming had a larger share of the existing rights, and they accordingly gave Montana a larger share of the unappropriated third-tier water than had previous drafts. See Report 20-21. But that understanding was only approximate, yet the drafters concluded that the Compact should go forward. See Special Master J.A. 233.[6]

That fact refutes Montana's notion that the Compact entitles it to a specific quantity of water, rather than to

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[6] Montana argued before the Special Master that Wyoming's view of Article V(A)—that it preserved existing rights as a matter of state law and did not make them enforceable under the Compact—was untenable because it would fail to "remove all causes of present and future controversy," as the Compact preamble recited. *E.g.*, Mont. Br. in Resp. to Mot. to Dismiss 23-27. The Special Master rejected Wyoming's view and agreed with Montana that Article V(A) provides enforceable and binding protection for first-tier water rights in the two States. Report 22-25. Montana now argues (Exception Br. 39) that the Special Master's view, too, is untenable because it, too, would fail to "remove all causes of present and future controversy," and that only awarding Montana a quantified allocation of water *independent* of individual water users' rights would provide such a resolution. As shown in the text, that view was not shared by the Compact's drafters.

the specified protection for its pre-1950 water rights. Montana is thus wrong in asserting (Exception Br. 9) that "[t]he Special Master correctly found that [the Compact] obligates Wyoming to deliver at the state line a block of water sufficient under the stream conditions then in existence to satisfy Montana's pre-1950 rights." See also *id.* at 14, 24, 38. The cited page of the Special Master's report refers not to a block of *water*, but to "block protection for all existing, pre-1950 appropriations, without attempting to quantify the amounts of those appropriations." Report 21. The Special Master's point—which is correct—is that the Compact drafters protected pre-1950 rights as a block precisely because the drafters did not know the exact scope of the individual rights, and concluded they did not need to know. See, *e.g.*, Report 28 (explaining that "the drafters of the Compact chose not to require Wyoming to deliver a specific, fixed quantity of water to its border with Montana"). Although pre-1950 water users in both States must be satisfied before post-1950 water users in either State, if there is insufficient water to satisfy both States' pre-1950 users, the Compact does not require one State (presumably Wyoming, the upstream State) to curtail its pre-1950 water users' full enjoyment of their appropriative rights so that pre-1950 water users in the downstream State can fully enjoy theirs.[7]

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[7] This case does not present the question whether, if Wyoming's pre-1950 users in Wyoming were consuming a disproportionately large share of water in a time of shortage and leaving little or none for Montana's pre-1950 users, Montana could sue in this Court for an equitable apportionment of pre-1950 water rights. See, *e.g.*, *Nebraska* v. *Wyoming*, 325 U.S. 589, 608-610, 616-618 (1945). Montana has not pleaded any such claim. Rather, Montana contends that it is entitled to satisfy all of its pre-1950 rights before Wyoming does, such that Wyoming

Accepting the Special Master's understanding of the Compact, including the fact that it does not entitle Montana to delivery of a specific quantity of water, fatally undermines each of Montana's theories, as explained below.

II. THE COMPACT DOES NOT OVERRIDE PRE-1950 WYOMING WATER USERS' APPROPRIATIVE RIGHT TO ELIMINATE INEFFICIENCIES

Montana's primary submission is that the Compact is breached if, at a time when pre-1950 water users in Montana are short, a pre-1950 water user in Wyoming uses the water he diverts more efficiently than he did in 1950, such that although the same amount of water is diverted today as in 1950, at the same point and for the same use on the same acreage,[8] less of the diverted water *returns* to the river. For example, using a sprinkler system rather than flood irrigation allows crops to consume more water and leaves less water to return to the stream as return flows. Mont. Exception Br. 3.

Montana does not appear to dispute that under Wyoming law, the irrigator's (pre-1950) appropriative right includes the right to reap the benefit of any efficiency gains himself. Indeed, if that were not the case, the more efficient irrigation could be enjoined—and any Compact breach necessarily averted—under Wyoming law by anyone with a priority date *after* 1950 (but before

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would be first to bear the burden of any shortfall so severe as to affect pre-1950 users as well as post-1950 users.

[8] Montana separately alleges that Wyoming users have in fact used their pre-1950 diversions to irrigate *new* acreage that was not irrigated in 1950. Compl. ¶ 10. The Special Master agreed that that allegation, if proved, would establish a breach of the Compact, Report 40-41, 89, and Wyoming has not excepted to that conclusion.

the implementation of the more efficient method) whose water rights were adversely affected as a result. Rather, Montana contends that *even if* the diversion is in accordance with the state-law water right, it exceeds the pre-1950 appropriative right that is protected by Article V(A). In Montana's view, therefore, the Compact treats the additional increment of consumption as a post-1950 use that, in times of shortage, must yield to pre-1950 uses in Montana.

The Special Master correctly concluded that the Compact does not override any appropriative right to recoup increased efficiencies, nor does it specifically allocate return flows as of 1950 to Montana. As discussed above, the central structural feature of Article V(A), the Compact's first-tier protection, is that it protects *pre-existing* state-law water rights. Montana has not identified anything in the Compact's text, structure, or history suggesting an intent to modify or override those state-law rights with respect to efficiency gains.

A. The Text Of The Compact Does Not Override Wyoming Users' Pre-1950 Appropriative Rights

The first tier of protection under the Compact applies to "[a]ppropriative rights to the *beneficial uses* of the water of the Yellowstone River System." Art. V(A), 65 Stat. 666 (emphasis added). The Compact, in turn, defines "Beneficial Use" to mean "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Art. II(H), 65 Stat. 665. Contrary to Montana's argument, the use of the term "depleted" in the definition of "[b]eneficial [u]se" does not affect the interpretation of the operative provision, Article V(A), in any way that helps Montana.

1. As the Special Master explained, "beneficial use" is a central concept in the doctrine of appropriation followed in Montana, Wyoming, and many other western States. *E.g.*, Report 4-5, 61. Under the doctrine of appropriation, the first person to appropriate water "'for a beneficial use'" gains a right to that water that is superior to any later appropriator's right, "but only 'to the extent of his actual use,'" leaving excess water free for future appropriators. *Andrus* v. *Charlestone Stone Prods. Co.*, 436 U.S. 604, 615 (1978) (quoting *California Or. Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 154 (1935)); accord *Arizona* v. *California*, 373 U.S. 546, 555 (1963); 2 Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights* § 691, at 1194-1195 (2d ed. 1912) (Kinney). "Beneficial use" (or "useful[] employ[ment]," Compact Art. II(H), 65 Stat. 665) is a very broad concept, see, *e.g.*, *id.* §§ 690-691, at 1193-1194; *Basey* v. *Gallagher*, 87 U.S. (20 Wall.) 670, 683 (1875), although state law may decline to recognize some purposes as beneficial, see, *e.g.*, *Osnes Livestock Co.* v. *Warren*, 62 P.2d 206, 214 (Mont. 1936) (diversion purely to maintain a swimming pool or fish pond not then considered a beneficial use). The chief purpose of the "beneficial use" requirement is to prevent both waste and hoarding by ensuring that appropriators cannot assert a right to more than they need and can use. See, *e.g.*, *Basey*, 87 U.S. (20 Wall.) at 683 ("It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.").

The definition of "[b]eneficial [u]se" in Article II(H) fits neatly with that well-established concept. Article V(A) expressly incorporates "the laws governing the

acquisition and use of water under the doctrine of appropriation," 65 Stat. 666, and the Compact's definition of "[b]eneficial [u]se" fits with what was already the law in both Montana and Wyoming: that state-law water rights, and hence the first tier of the Compact, will not protect water diversions for a non-beneficial use, *i.e.*, water that will not be usefully employed.

2. Nothing in Article II(H)'s definition of "[b]eneficial [u]se" supports Montana's assertion that the Compact *supersedes* the relevant principle of Wyoming water law. Montana does not allege that Wyoming awarded any pre-1950 water rights for uses that should be deemed non-beneficial, or that Wyoming users in 1950 (or later) appropriated wastefully large amounts that exceed what their beneficial use could justify. Rather, Montana contends (Exception Br. 18-19, 25-28) that, of its own force, the Compact's definition of "[b]eneficial [u]se" overrides any Wyoming water-law principle that allows appropriators who improve the efficiency of their irrigation method to reap the benefit of the improvement rather than maintaining the same return flows that previously occurred with less efficient methods. That is so, Montana argues, because the definition of "[b]eneficial [u]se" refers to "use by which the water supply of a drainage basin is *depleted* when usefully employed by the activities of man." Compact Art. II(H), 65 Stat. 665 (emphasis added).

The Special Master correctly rejected that contention, for two reasons. "Beneficial [u]se" is not defined to be synonymous with depletion, as Montana would have it. And even if it were, water that is diverted for beneficial use, but lost in the course of the diversion, does cause water in the river to be "depleted," and thus beneficially used, as the Compact uses those terms.

a. First, beneficial use, as defined in Article II(H), must *involve* a depletion, but the beneficial use is not confined to the depletion itself or, as under Montana's even narrower formulation, to actual crop consumption. When water is diverted from the river system and put to a useful purpose, "the water supply of [the] drainage basin *is* depleted" by that diversion and use, Compact Art. II(H), 65 Stat. 665 (emphasis added), and the textual definition of "[b]eneficial [u]se" is therefore met, even if some of that water later indirectly makes its way back into the river system. See Wyo. Reply to Mont. Exception 20 (Wyo. Exception Reply Br.); cf. Compact Art. II(G), 65 Stat. 665 ("The terms 'Divert' and 'Diversion' mean the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned *directly* into the channel of the Yellowstone River or of the tributary from which it is taken.") (emphasis added).

The reference to "deplet[ion]" in the Compact is properly read to refer to the venerable water-law principle that, to acquire a property right to use water, the appropriator must remove that water from the stream. See, *e.g.*, 2 Kinney § 722, at 1242-1243 (appropriation requires "an actual diversion of the water," because "no possession or exclusive property can be acquired while it is still flowing * * * in its natural channel or stream"); Wyo. Exception Reply Br. 20-21. Thus, as Wyoming explains, the Compact precludes the party States from treating purely in-stream uses of water as "beneficial uses" for Compact purposes. *Id.* at 21.[9] But that principle has no relevance here: irrigation is a ben-

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[9] Several western States now recognize in-stream uses as "beneficial use." *E.g.*, Mont. Code Ann. § 85-2-102(4)(d) (2009).

eficial use, whether or not the irrigation method involves some inefficiencies that yield return flows.

Moreover, the Compact preserves "appropriative rights," not "deplet[ions]." The operative provision, Article V(A), gives first-tier protection to "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950." 65 Stat. 666. Under Wyoming law, the relevant set of pre-1950 water users have "[a]ppropriative rights" to divert water from the river system (the same amount that they are diverting today) if they put that diverted water to beneficial use (the same beneficial use as today). And that use—irrigation—plainly is one that depletes the water supply. See Wyo. Exception Reply Br. 39-43.

b. Second, even if it were proper to focus only on the particular water flows that, in 1950, were lost and returned to the river following diversion for irrigation, those flows nonetheless were beneficially used. The Compact's reference to "deplet[ion]," without further defining that term, encompasses *temporarily* removing water from the river system; "depletion" need not be read to mean "net depletion" or "permanent depletion." Rather, in this context, both "beneficial use" and "deplet[ion]" are more naturally read to have their established meaning under the doctrine of appropriation: water that is lost during irrigation has long been deemed to be part of the water that the irrigator puts to "beneficial use" and, thus, part of the appropriative right. See, *e.g.*, 2 Kinney § 907, at 1601 ("natural losses of the water in transit" do not constitute "the wast[e] of water"); accord 1 Wells A. Hutchins et al., *U.S. Dep't of Agric., Misc. Pub. No. 1206, Water Rights Laws in the Nineteen Western States* 498, 512-513 (1971) (Hutchins); 1 Samuel

C. Wiel, *Water Rights in the Western States* § 488, at 526-527 (3d ed. 1911).[10] See generally, *e.g.*, *Washington* v. *Oregon*, 297 U.S. 517, 523-524 (1936) (sustaining findings that upstream irrigators' use was "not unduly wasteful"). That is so even though there may be a substantial difference between what is diverted and what actually reaches the fields for which it is diverted. 2 Kinney § 907, at 1601 (up to half the water passing through "the average unlined earthen canals and ditches" never reaches the fields).

Thus, both in 1950 and today, the Wyoming water users were and are "deplet[ing]" "the water supply of [the Yellowstone] drainage basin" by putting that water to "useful[] employ[ment]"—that is, they were and are putting it to beneficial use. The Compact's definition of "[b]eneficial [u]se" does not suggest that the size of the appropriative right should be limited by the extent to which the diversion in 1950 actually resulted in a *net* depletion of the waters of the river system.

B. The Structure Of The Compact Does Not Suggest That It Overrides Wyoming Users' Pre-1950 Appropriative Rights

1. Article V(A) is based on water rights, not a fixed interstate apportionment of water

Montana infers from the structure of the Compact that it creates an "allocation methodology" that is "permanent as long as the Compact remains in effect." Exception Br. 14. The "methodology" for protecting first-tier water rights under the Compact is indeed perma-

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[10] By contrast, waste that could be prevented through the application of reasonable diligence (for example, fixing a leak in a pipe) is not a beneficial use. *E.g.*, 1 Hutchins 512-513.

nent (as all parties and the Special Master generally agree): the appropriative rights existing in 1950 "shall continue to be enjoyed." But Montana's further inference—that the exercise of such rights must be perfectly static—is unsupported.

"[T]he doctrine of appropriation," which regulates those rights, is itself a somewhat dynamic concept, as two examples illustrate. First, and most significantly for Compact purposes, the doctrine of appropriation provides that water rights lapse if the appropriator abandons the beneficial use for which he originally diverted the water. *E.g.*, Report 65-66; *Charlestone Stone Prods. Co.*, 436 U.S. at 615; *Washington* v. *Oregon*, 297 U.S. at 527-528. Thus, as pre-1950 water rights in Wyoming lapse and are replaced by *post*-1950 water rights, the Compact's treatment of those rights will change accordingly (to Montana's benefit).

Second, and conversely, in some circumstances the doctrine confers a right to divert *more* than was actually put to beneficial use at the time of the initial appropriation, if the appropriator had the expanded beneficial use in mind at the time of the diversion and worked with "reasonable diligence" to put the water to it. *E.g.*, 2 Kinney §§ 733-741, at 1266-1283; *Anaconda Nat'l Bank* v. *Johnson*, 244 P. 141, 143 (Mont. 1926). Those are "change[s] by individual water users" (Mont. Exception Br. 14) that nonetheless affect the first-tier protection that one State enjoys.

Accordingly, the inference on which Montana relies —that changes by individual water users should not alter the Compact's overall operative effect on the party States—is simply not a sound one. The Compact drafters chose to give first-tier protection to the pre-1950 water rights already actually held by individuals, rather

than to give a particular quantity or percentage to each State. Therefore, to the (modest) extent that consumption under those pre-1950 water rights changes over time while remaining in accordance with the doctrine of appropriation, the Compact protection will naturally follow along.[11]

Montana's reliance on other compacts, and precedents interpreting them (Exception Br. 15-16), is misplaced. This Compact took a unique approach, as the drafters recognized. Indeed, this Compact (like many others) specifies that the conditions to which it responds are unique and do not set any precedent. See Compact Art. XIV, 65 Stat. 669 (disclaiming any agreement to "the establishment of any general principle or precedent with respect to other interstate streams," because each State's decision to sign the Compact was "actuated" by "[t]he physical and other conditions characteristic of the Yellowstone River and peculiar to the territory drained and served thereby"). And even to the extent it might be appropriate in interpreting one compact to look to similar compacts, the two examples Montana gives are altogether inapposite. Those compacts expressly allocate a particular quantity of water between or among

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[11] To be sure, the Compact is an agreement between States, not among individual water users, and those water users are bound by their States' agreement. See Mont. Exception Br. 13, 15 (relying on *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)); cf. *South Carolina* v. *North Carolina*, 130 S. Ct. 854, 867 (2010) (States represent their water users in interstate disputes settled by equitable-apportionment litigation rather than compact); *id.* at 874 (Roberts, C.J., concurring in part and dissenting in part) (same). Indeed, the Compact makes that point explicit. See Compact Art. I(A) and (B), 65 Stat. 664. But because this Compact protected each State's first-tier right based entirely on the existing appropriative rights of individual water users, in this case the States are also bound by the rights of their water users.

the signatory States. See Republican River Compact, ch. 104, Art. IV, 57 Stat. 86 (1943) (allocating specific amounts of water, in acre-feet, to each State); *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 96-97 (1938) (quoting La Plata River Compact, ch. 110, Art. II(1)-(3), 43 Stat. 797 (1925)). The drafters of the Yellowstone River Compact expressly did not incorporate such a fixed-quantity approach into *any* of the Compact's three tiers.

2. The Special Master consistently interpreted the Compact's structure

Montana wrongly contends (Exception Br. 20-23) that the Special Master's analysis was inconsistent because the Master rejected Montana's increased-efficiency theory even after accepting its three other theories of Compact breach. As the Special Master correctly explained, Montana's three other theories all allege that pre-1950 users in Montana are short of water at a time when water is being diverted to one or more *post*-1950 uses in Wyoming. Because the Compact protects pre-1950 rights against interference by post-1950 uses, those allegations state a claim of Compact breach. Report 56. Montana's increased-efficiency allegation, by contrast, cannot state a claim under the Compact if it involves only a conflict between pre-1950 rights. Montana protests (Exception Br. 23) that there is "no express exception of any kind from the general rule that pre-1950 rights will be protected." That is incorrect: the Compact does not protect pre-1950 rights against *other* pre-1950 rights, because, as Montana acknowledges elsewhere in its brief (*id.* at 33), the drafters rejected the idea that the Compact would administer disputes between existing rights across state lines.

To be sure, if Montana could establish that irrigating today, using water that was diverted but wasted in 1950, is outside the scope of the pre-1950 water right, it could state a claim for breach of the Compact, because the new practice would be a post-1950 use for purposes of the Compact. As shown above, Montana's claim fails because it cannot make that showing, not because of any inconsistency in the Special Master's reasoning.

C. The Compact's History Further Refutes Any Notion That It Imposed A New Rule Overriding Wyoming Law Regarding An Appropriator's Right To Reduce Inefficiency

Montana contends (Exception Br. 30-31) that the legislative history of the Compact's approval by Congress supports the proposition that the first-tier rights protected by the Compact would be fixed and unchanging, and that "the Compact would not allow one State to cause another State to receive a different supply of water." Exception Br. 30. Montana misreads the relevant Senate Report, which simply explains that the recognition of existing pre-1950 water *rights* does not guarantee that there will always be a sufficient water *supply* to fulfill those rights. See Senate Report 2 (explaining that although "existing appropriative rights as of January 1, 1950, are recognized," "[n]o regulation of the supply is mentioned for the satisfaction of those rights"). That discussion has nothing to do with the scope of the "[e]xisting appropriative rights" that "are recognized," *ibid.*

To the contrary, the history of the Compact's consideration before Congress, including both the Executive Branch's account of its role in the compact-negotiation process and the relevant congressional committees' reports on the legislation approving the Compact, indi-

cates that neither of the responsible Branches of government thought that any pertinent change was being made in the first-tier water rights. Thus, the legislative history confirms that the Compact "recognizes *all* existing beneficial uses as of January 1, 1950." Senate Report 3 (emphasis added); accord *id.* at 11 (Secretary of the Interior's message to Congress); House Report 2.

Furthermore, the other passage from the Senate Report on which Montana relies (Exception Br. 29) undercuts its argument. The Senate Report notes that the allocations of third-tier water, in Article V(B), "take into account return flows and uses of them, as well as original runoff." Senate Report 2. It is certainly true that, to the extent some flows return to the stream and are diverted again, both diversions count. But in computing the percentage allocations under Article V(B), the Compact expressly uses the "*total* diversions," not the net diversions, as Montana suggests. Compact Art. V(C)(1), 65 Stat. 667 (emphasis added); see *id.* Art. II(G), 65 Stat. 665 (defining "Diversion" to include any "taking or removing of water from" the river system "when the water so taken or removed is not returned *directly* into the channel") (emphasis added). Thus, it is not the case that the Compact treats all diversions on a "net of return flow" basis.

The negotiating history of the Compact also refutes Montana's attempt to infer a new limitation on the scope of the protected appropriative right. That history is an appropriate source of interpretive guidance in construing the Compact, which is an agreement among States as well as a federal statute. See *Oklahoma* v. *New Mexico*, 501 U.S. 221, 235 n.5 (1991); *Arizona* v. *California*, 292 U.S. 341, 359-360 (1934); cf. *Zicherman* v. *Korean Air Lines Co.*, 516 U.S. 217, 226 (1996) (applying the

same principle to treaty interpretation). Here that history shows only that the negotiators were well aware of the fact that irrigation efficiency affects return flow, as Montana acknowledges. Exception Br. 29 (citing Special Master J.A. 764).[12] But contrary to Montana's suggestion, there is no indication in the negotiating history that the States agreed to preserve return flows as they were in 1950. The one piece of negotiating history Montana cites, Special Master J.A. 502, comes from a much earlier round of negotiations, in 1939, well before the negotiators had even settled on the idea of preserving existing rights, as Article V(A) ultimately did. See Report 6-7, 20-22, 31-32. The negotiators who agreed on the final Compact generally agreed that the construction of storage, not the preservation of return flows, would be the key element in ensuring that the irrigation needs of the Yellowstone River Basin would continue to be met. See Special Master J.A. 59, 231; Senate Report 6-7 (Federal representative's report); *id.* at 10 (Secretary of the Interior's letter); see also Wyo. Exception Reply Br. 26-28 (explaining the negotiators' rejection of a proposal to put "a ceiling on the depletion to take place upstream") (quoting Special Master J.A. 228).

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[12] Moreover, although Wyoming is correct (Exception Reply Br. 35 n.6) that Montana has not yet made a record about the relative efficiency of sprinklers and other irrigation methods, this Court can take note of the fact that advances in irrigation were well underway at the time of the Compact. See, *e.g.*, Robert M. Morgan, *Water and the Land* 11-17, 19-24, 35 (1993) (detailing the history of sprinkler irrigation since the late 19th century, including the "portable sprinker irrigation * * * heavily utilized" in Nebraska by the time of the Compact's adoption); Terry A. Howell, *Drops of Life in the History of Irrigation*, Irrigation J., Jan. 1, 2000, at 8.

D. Montana Has Not Established That Wyoming Water Rights Are Inconsistent With The Doctrine Of Appropriation

As discussed above, the Compact requires that all first-tier water rights protected by Article V(A) be consistent with "the doctrine of appropriation," which the Special Master construed to refer to the doctrine in general terms, not the law of one or more of the compacting States. Accordingly, the Special Master left open the possibility that a particular water right may be impermissible under the Compact even though permissible under one State's law. Here, however, the Special Master concluded that Wyoming law, Montana law, and the general principles of prior-appropriation law as applied by this Court and by state courts are generally in accord on the relevant principles. See Report 39-40.

Montana contended before the Special Master that the doctrine of appropriation, as applied through the Compact, foreclosed Wyoming from contending that its own water law conferred a right to retain the benefit of increased efficiencies. Mont. Letter Br. 1-12 (July 17, 2009). Montana does not renew that contention here, however: it apparently accepts the Special Master's conclusion that appropriation doctrine does not provide a clear, universal answer to this question, and it contends that the Master should therefore have looked only to the text and structure of the Compact. Mont. Exception Br. 32.[13] As already explained, neither the text nor

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[13] Montana's principal discussion of the doctrine is its assertion that "the Wyoming cases relied upon by the Special Master are inapposite." Mont. Exception Br. 34. To the extent that Montana is read to renew its affirmative argument that the doctrine *forbids* water users from retaining the benefit of increased efficiencies, see *id.* at 35-36, the cases Montana cited to the Special Master do not establish any such clear

the structure justifies denying the protection of Article V(A) to water uses that, under Wyoming law, are within the scope of a pre-1950 water right.

III. MONTANA CANNOT ESTABLISH A BREACH OF THE COMPACT'S FIRST-TIER PROTECTION UNTIL IT SHOWS INJURY TO A RIGHT PROTECTED BY ARTICLE V(A)

In a brief second argument in support of its exception, Montana contends that it should be permitted to show a Compact breach based on injury to its pre-1950 users, irrespective of whether those pre-1950 users can obtain redress under Montana law against water users junior to them. That argument provides no basis for overruling the Special Master's recommendation.

As an initial matter, the Court may wish to leave this issue open for further proceedings before the Special Master. This Court generally prefers to entertain exceptions only after a Special Master has had the opportunity to address the arguments therein. See *United States* v. *Florida*, 420 U.S. 531, 533 (1975) (per curiam). As Wyoming notes (Exception Reply Br. 45), the Special Master raised the issue of intrastate remedies in his initial memorandum opinion and afforded the parties ample opportunity to dispute that and any other issue; Montana did not address intrastate remedies in its re-

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common-law principle. See Wyo. Exception Reply Br. 37-44; U.S. Letter Br. 3-4 (July 24, 2009); Wyo. Resp. to Mont. Letter Br. 4-6 (Aug. 3, 2009); accord, *e.g.*, Wells A. Hutchins, *U.S. Dep't of Agric., Misc. Pub. No. 418, Selected Problems in the Law of Water Rights in the West* 372 (1942) ("[T]he general rule" under prior-appropriation law "is based upon the principle that one should be entitled to the fruits of his labors, where the result is to make available a supply that otherwise would go to waste, and in which event no other party is being deprived of water which he is entitled to receive.").

sponsive briefing before the Master. And the Report does not definitively establish the boundaries of any obligation to pursue intrastate remedies: the Special Master left open, pending factual development, the questions of when intrastate remedies are adequate and do not prejudice Montana's rights under the Compact. Report 28.

To the extent that the Court reaches the question, it should overrule this aspect of Montana's exception. As shown above, Article V(A) of the Compact simply does not follow the model of other compacts that allocate specific amounts or percentages of water to each of the compacting States. See pp. 24-25, *supra*. By choosing the existing appropriative rights, rather than a fixed quantity or percentage, as the basis for the first-tier protections, the Compact contemplates that any claim of injury that Montana can make under Article V(A) must be one based on injury to its pre-1950 water users.[11]

When a pre-1950 water user in Montana is short of water, Montana's law of appropriation permits that user to demand that any other Montana water user with a later priority date cease diversion so that the senior water right may be satisfied. See, *e.g.*, *Granite Ditch Co.* v. *Anderson*, 662 P.2d 1312, 1317 (Mont. 1983) ("We need not cite authority for the proposition that 'first in time, first in right' is the controlling principle."). The Special Master properly recognized that when such an intrastate remedy is available for the injury to a Montana water user, that water user cannot attribute his injury to Wyoming, or to a Compact breach.

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[11] The Special Master concluded that at this point, only Article V(A)'s protection is relevant. Report 35.

Accepting Montana's contrary argument on this point would permit Montana to assert a Compact breach even when Wyoming has done nothing to prevent Montana's pre-1950 users from enjoying their rights under the Compact. Indeed, by forgoing intrastate measures, thereby allowing its post-1950 users to keep their water, and seeking relief against Wyoming on behalf of the pre-1950 users, Montana would effectively be redirecting pre-1950 water to post-1950 users, which the Compact does not permit. Wyoming cannot be required to provide water to post-1950 users in Montana except in accordance with the percentage allocations set out in Article V(B) and (C), which are computed annually and not based on short-term shortages.

CONCLUSION

The exception should be overruled, the motion to dismiss should be denied in accordance with the Special Master's recommendation, and the case should be recommitted to the Special Master.

Respectfully submitted.

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JUNE 2010

IN THE SUPREME COURT OF THE UNITED STATES

No. 137, Original

STATE OF MONTANA, PLAINTIFF

v.

STATE OF WYOMING AND STATE OF NORTH DAKOTA

ON EXCEPTIONS
TO THE FIRST INTERIM REPORT
OF THE SPECIAL MASTER

MOTION OF THE UNITED STATES AS AMICUS CURIAE
FOR DIVIDED ARGUMENT AND TO PARTICIPATE IN ORAL ARGUMENT

Pursuant to Rules 28.4 and 28.7 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States, respectfully moves for leave to participate in the oral argument in this case as amicus curiae opposing plaintiff's exception, if the case is set for oral argument, and that the United States be allowed ten minutes of defendant Wyoming's argument time. Wyoming has agreed to cede ten minutes of its argument time to the United States if the case is set for oral argument.* Granting this motion accordingly would not require the Court to enlarge the overall time for argument.

Montana's bill of complaint alleges that Wyoming has breached the Yellowstone River Compact (Compact). The Compact regulates the

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* Wyoming is the only defendant claiming argument time: no relief has been sought against defendant North Dakota, and North Dakota is not actively participating at this stage of the case.

allocation of water in the Yellowstone River Basin, including four principal tributaries of the Yellowstone River that flow from Wyoming into Montana. Montana contends that Wyoming has consumed and is consuming more water from two of those tributaries, the Tongue and Powder Rivers, than the Compact permits. Montana alleges four specific ways in which it contends Wyoming has violated the Compact. Wyoming has moved to dismiss the bill of complaint, and the Special Master appointed by this Court has recommended denying that motion in nearly all respects. The Special Master has recommended, however, that Montana not be permitted to go forward on one of its four theories. The Court is considering Montana's exception to the latter ruling.

The United States has participated as amicus curiae throughout this action: At the Court's invitation, the United States filed a brief recommending that the Court grant Montana leave to file its bill of complaint. The United States also filed an amicus curiae brief in partial support of and partial opposition to the motion to dismiss. And the United States has participated, through both written and oral submissions, in proceedings before the Special Master.

The First Interim Report of the Special Master notes (at 13) that the views of the United States are important to the resolution of the disputed issues in this case. The United States has an interest in the correct interpretation of the Compact, an inter-

state agreement negotiated with federal participation, approved by Congress, and possessing the status of federal law. The United States also administers water projects throughout the Yellowstone River Basin that may be affected by the Court's construction of the Compact. Furthermore, pursuant to Winters v. United States, 207 U.S. 564 (1908), the United States also holds certain rights to waters of the Yellowstone River system in trust for the Indian Tribes whose reservations lie in the river basin.

The United States has regularly participated in oral argument as amicus curiae in actions within this Court's original jurisdiction. See, e.g., Alabama v. North Carolina, No. 132, Original (June 1, 2010); South Carolina v. North Carolina, 130 S. Ct. 854 (2010); New Hampshire v. Maine, 532 U.S. 742 (2001); Arizona v. California, 530 U.S. 392 (2000); New Jersey v. New York, 523 U.S. 767 (1998).

In light of the substantial interest of the United States in the issues in this case, and the United States' unique perspective on those issues, oral presentation of the views of the United States would be of material assistance to the Court.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

JUNE 2010

No. 137, Original

In The Supreme Court of the United States

STATE OF MONTANA,

Plaintiff,

v.

STATE OF WYOMING

and

STATE OF NORTH DAKOTA,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

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OTHER AUTHORITIES

A. Dan Tarlock, *Law of Water Rights and Resources* (Thomson Reuters/West 2009) 9

Joseph L. Sax, Barton H. Thompson, Jr., John D. Leshy and Robert H. Abrams, *Legal Control of Water Resources* (Thomson/West 2006) 10, 13

Robert E. Beck & Eugene Kuntz, *Reallocations, Transfers, and Changes*, in *Waters and Water Rights*, at 14-54 (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009) 13

South Carolina v. North Carolina, No. 138 Orig., *Brief for the United States as Amicus Curiae in Support of Plaintiff's Exceptions* (Feb. 2009) 18

STATEMENT

This is a suit brought by Montana to require Wyoming to comply with its obligations under the Yellowstone River Compact ("Compact"). The Compact was entered into by three States with the approval of Congress. The Compact distinguishes between uses existing as of January 1, 1950 ("pre-1950") and uses initiated after January 1, 1950 ("post-1950"). The Special Master's First Interim Report ("FIR") addresses the extent to which Montana's Bill of Complaint states a claim under Article V(A) of the Compact.

Montana has filed an Exception ("Mont. Br.") questioning two legal conclusions of the FIR. The Northern Cheyenne Tribe has filed a brief *amicus curiae* in support of Montana's Exception ("N. Cheyenne Br."). The State of Wyoming and the United States, as *amicus curiae*, have filed briefs ("Wyo. Br." and "U.S. Br.") opposing Montana's Exception.

SUMMARY OF ARGUMENT

The Yellowstone River Compact is a treaty among States approved by Congress, not an agreement among individual water users. It incorporates a complete apportionment of the waters of the Yellowstone River System, subject to express exceptions, which is fixed with respect to pre-1950 uses. The Compact incorporates direct consumptive use limits, without which its purpose of allocating the waters would be

unachievable. Contrary arguments based on divertible flow methodologies are not relevant to the fundamental principle that one State may not deplete water allocated to another State under the Compact. The Compact is largely complete unto itself and does not require extensive resort to extrinsic sources of law.

Montana's Exception is focused on protection of Montana's Article V(A) pre-1950 entitlement. Article V(A) requires that Montana receive the same amount of water that Montana would have received for its uses as of January 1, 1950, under the same water supply conditions.

As to the second part of Montana's Exception, the Special Master erred in holding that Wyoming's Compact obligations are contingent on Montana's actions. No language in the Compact supports such a condition precedent, and it would be contrary to the structure of Article V, which creates rights in the signatory States, not in individual water users.

Montana has not waived this argument, and the issue is ripe for resolution. However, Montana does not object to the United States' suggestion that it be deferred for later resolution.

ARGUMENT

I. Article V(A) Protects Montana's Entitlement Based on Pre-1950 Uses

A. Wyoming and the United States Ignore the Compact's Protection of Montana's Pre-1950 Entitlement

Wyoming and the United States focus on Wyoming's rights under the Compact and ignore Montana's.[1] They argue that Article V(A) incorporates Wyoming law, which, they assert, allows Wyoming water users to increase their depletions and thereby diminish or eliminate their return flows to the river. Wyoming and the United States essentially fail to address the effect of their position on Montana's pre-1950 entitlement. Article V(A), however, expressly

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[1] The United States suggests that "Montana could sue in this Court for an equitable apportionment of pre-1950 water rights." U.S. Br. 15 n.7. This statement neglects the fact that the Compact has already apportioned all the waters of the Tongue and Powder Rivers and the rule that "no court may order relief inconsistent with [a compact's] express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). The United States also misstates Montana's claim. "Montana contends that it is entitled to satisfy all of its pre-1950 rights before Wyoming does, such that Wyoming would be the first to bear the burden of any shortfall so severe as to affect pre-1950 users as well as post-1950 users." U.S. Br. 15-16 n.7. To the contrary, Montana has taken just the opposite view. See Bill of Complaint, ¶ 8 ("Wyoming refuses to curtail consumption of the waters of the Tongue and Powder Rivers *in excess of Wyoming's consumption of such waters existing as of January 1, 1950*") (emphasis added).

provides for and protects the pre-1950 allocations of *both* States.

Further, Article V(A) expressly provides that Montana "shall continue to enjoy" its pre-1950 water supply. This mandatory provision of Article V(A) is violated if Montana is no longer allowed to receive the water that supplied its users' water rights as of January 1, 1950. See Sen. Rep. No. 883, 82d Cong., 1st Sess. (1951), at 2, Joint App. 13 (explaining that uses of the basin were recognized and protected from "a demand of one State upon another for a supply different from that now obtaining under present conditions of supply and diversion"). Neither Wyoming nor the United States explains how their view can be squared with Article V(A).

The interpretation advanced by Wyoming and the United States ignores the term "beneficial uses" in the first phrase of Article V(A) and the definition of that term in Article II(H). Instead, Wyoming and the United States focus on the words "appropriative rights" as their basis for arguing that Article V(A) incorporates the Wyoming doctrine of appropriation. Yet Article V(A) does not expressly incorporate the law of Wyoming to determine Montana's Compact rights. It would be an anomaly among interstate water compacts if it did, and it would be an anomaly for this Court to so hold. Cf. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951) ("It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for

a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States").

Article V(A) applies to (1) "Appropriative rights to" (2) "the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950." Although Wyoming and the United States emphasize (1) "appropriative rights" over (2) "beneficial uses," to do so is inconsistent with the structure of Article V as a whole. As will be seen, *both* terms must be satisfied. Article V divides all the waters of the Interstate Tributaries between the Article V(A) portion: "Appropriative rights to the beneficial uses of the water . . . existing in each signatory State as of January 1, 1950;" and the Article V(B) portion: "the unused and unappropriated waters . . . as of January 1, 1950."[7] The two parts of the "pie" differ according to whether the water was "unused and unappropriated" as of January 1, 1950 or not. Thus, to fully complement Article V(B), Article V(A) must apply to all waters that, as of January 1, 1950, were *both* "used and appropriated." Moreover, it is the more plausible reading of Article V(A) that the term "Appropriative rights to the beneficial uses of waters" means that Article V(A) applies to waters that were *both* appropriated *and* beneficially used as of January

[7] No exception has been taken to the Special Master's ruling that Articles V(A) and V(B) together allocate all of the waters of the Interstate Tributaries. FIR 10-11.

1, 1950. In turn, "beneficial use" is limited to the amount of water depleted. See *infra*, Section I.B.

Wyoming and the United States argue that the Wyoming doctrine of appropriation, described by the United States as "a somewhat dynamic concept," is incorporated into Article V(A). In other words, they argue that the allocation among the States is not fixed, but changes based on the actions of individual water users. The United States gives two examples of the "dynamic" nature of the doctrine of appropriation: (1) loss by abandonment of a water right, and (2) increased use under an existing water right.[1] U.S. Br. 23. Neither of these changes is recognized by Article V of the Compact, however. To do so would run afoul of the structure of Article V. As described above, Article V(A) and Article V(B) together allocate all of the waters of the interstate tributaries *as of January 1, 1950*. That is, the allocation is made based on the status of the waters, as used-and-appropriated or not, as of a single date, January 1, 1950.

While individual water rights can continue to be bought and sold and physically transferred within each State (*i.e.*, "continue to be enjoyed in accordance with the laws governing the acquisition and use under the doctrine of appropriation"), such changes cannot alter the allocations set by the Compact as

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[1] The Special Master rejected this second example as a possibility under Article V(A). FIR 62 n.10. No exception has been filed to that ruling.

between the States without destroying the symmetry of Article V. For example, the abandonment of a pre-1950 water right in Wyoming at a point in time after January 1, 1950 would create an anomalous situation under Article V: The water that had been subject to the abandoned water right, which was both appropriated and being used as of January 1, 1950, would no longer fit within either Article V(A) or Article V(B). Instead a new, unrecognized category would be created for water that was previously appropriated and in use as of January 1, 1950, but unappropriated and unused at some point after January 1, 1950. This result is incompatible with the structure of Article V, which provides no way to convert V(A) water to V(B) water.

B. Wyoming and the United States Resort to Extrinsic Evidence to Contradict the Plain Language of the Compact

As Montana explained in its opening brief, Article V(A) protects Montana's right to "continue to . . . enjoy [ ]" its "appropriative rights to the beneficial uses of water" existing in Montana as of January 1, 1950. FIR, at A-7; Mont. Br. 16-20. "Beneficial Use" is defined as "that use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man." Art. II(H), FIR, at A-4.

Both Wyoming and the United States essentially disregard the Compact's definition of "beneficial use," turning instead to perceived prior appropriation

"principles of water law." U.S. Br. 10. It is on these asserted principles of "western water law," Wyo. Br. 17, that Wyoming and the United States would have the Court rely in construing Article V(A) and the term "beneficial use." See Wyo. Br. 20; U.S. Br. 18-19. The United States goes so far as to suggest that Montana bears the burden of showing that the Compact "override[s]" the law of prior appropriation. U.S. Br. 10-11, 17. But this approach turns on its head the fundamental rule of statutory interpretation that a court will look first to the plain language of the statute, and will resort to extrinsic sources only if that language is ambiguous. See, *e.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well" (citations and internal quotation omitted)). Reliance on extrinsic law is misplaced here because the text of Article V(A) is unambiguous, and the Court need not look to extrinsic evidence to inform the defined Compact term of "beneficial use." See, *e.g.*, *Alabama v. North Carolina*, 130 S.Ct. 2295, 2305-2308 (2010).

Wyoming argues that the Compact definition of beneficial use "simply recognized the principle of appropriative rights doctrine that only water applied for beneficial purposes or 'uses' should be given state-sanctioned status." Wyo. Br. 20; see also *id.*, at 22. Likewise, the United States asserts that "the Compact's definition of '[b]eneficial [u]se' fits with what

was already the law in both Montana and Wyoming: that state-law water rights, and hence the first tier of the Compact, will not protect water diversions for a non-beneficial use." U.S. Br. 19. This construction renders the Compact's reference to "beneficial uses" superfluous and suggests a fundamental question: Why would the States expressly define "beneficial use" if they intended the reference to the "doctrine of prior appropriation" to import a different definition?

Under prior appropriation law, water can only be appropriated for a beneficial use, and beneficial use is necessary to hold an appropriative right. See, *e.g.*, *Wyoming v. Colorado*, 259 U.S. 419, 459 (1922); A. Dan Tarlock, *Law of Water Rights and Resources* § 5:66 (Thomson Reuters/West 2009). Wyoming and the United States suggest that the term "beneficial uses" in Article V(A) has the same meaning as under prior appropriation law, namely, the type of use to which water is put. However, Article V(A) references "appropriative rights to the beneficial uses of water," and the term "appropriative rights" already encompasses the prior appropriation doctrine meaning of beneficial use. Thus, this construction would render the explicit reference to "beneficial uses" in Article V(A), as well as the Article II(H) definition of that term, superfluous, a construction that is strongly disfavored. See, *e.g.*, *New Jersey v. Delaware*, 552 U.S. 597, 611 (2008) (not to attribute specific meaning to a specific term "would deny operative effect to each word in the Compact, contrary to basic principles of construction"). Therefore, a reading of the Compact that

refuses to recognize the unique reference to depletions in the definition of "beneficial use" is not viable.[4]

The United States argues that the term "deplet[ion]" in the Compact definition of beneficial use actually refers to the requirement that an appropriator "remove [the] water from the stream." U.S. Br. 20. The United States thereby argues that the term "deplet[ion]" was intended to have the same meaning as "diversion." But this is contrary to the commonly accepted notion of diversion. See Joseph L. Sax, Barton H. Thompson, Jr., John D. Leshy, Robert H. Abrams, *Legal Control of Water Resources* 1082 (Thomson/West 2006) (defining "diversion" as "[t]he extraction of water from its natural source"). There is no textual support for this theory. In fact, the language of the Compact supports the opposite conclusion – the definition of "Diversion" incorporates the concept of depletion. ("'Diversion' mean[s] the taking or removing water from [the stream] when the water so taken is not returned directly into the channel of the [stream]"). Art. II(G), FIR, at A-4; N. Cheyenne Br. 5. Nor is that theory supported by the doctrine of prior appropriation, which traditionally distinguishes diversions from depletions. See, *e.g.*,

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[4] The United States' argument that "[t]he reference to 'deplet[ion]' in the Compact is properly read to refer to the venerable water-law principle that, to acquire a property right to use water, the appropriator must remove that water from the stream," suffers from this same defect, failing to give the term "deplet[ion]" independent meaning from the term "diversion." U.S. Br. 20.

FIR 60-61 (distinguishing diversion of water from consumptive use).

In support of this argument, the United States suggests that "water that is lost during irrigation has long been deemed to be part of the water that the irrigator puts to 'beneficial use' and, thus, part of the appropriative right." U.S. Br. 21. But that is precisely Montana's point: the amount of water that was depleted based on pre-Compact technologies, *i.e.*, actually used, defines the rights that were locked in by Article V(A) – no less, no more.

C. Wyoming Law Was Not Incorporated into Article V(A), Nor Would It Support the Erosion of Montana's Pre-1950 Rights

The United States suggests that Montana has conceded that "under Wyoming law, the irrigator's (pre-1950) appropriative right includes the right to reap the benefit of any efficiency gains himself." U.S. Br. 16.[5] That is incorrect. As explained in Montana's opening brief, the doctrine of appropriation in Wyoming and throughout the West prohibits an appropriator from increasing his depletions to the detriment of downstream users. Mont. Br. 31-37.

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[5] The United States does not provide a citation for this assertion.

The Special Master, Wyoming, and the United States rely on "*Wyoming's* law of prior appropriation concerning increased irrigation efficiencies" to conclude that Wyoming may increase its depletions on pre-1950 irrigated acreage to the detriment of Montana's Compact rights. U.S. Br. 9 (emphasis added). As explained above, the Compact adopts a permanent allocation between the States. Even if the Compact does adopt a changing allocation based on an evolving concept of the prior appropriation doctrine, which Montana denies, Montana does not believe Wyoming or Montana law supports the Special Master's conclusion.

Contrary to the implication by Wyoming and the United States, a plain reading of the Compact as placing a quantitative limit on depletions in both States as of 1950 is consistent with the doctrine of appropriation. Indeed, the Special Master's understanding of "beneficial use" in Article V(A) as being *non*-quantitative, see FIR 61, is hard to reconcile with Wyoming's own statutory definition of beneficial use as the "basis, measure, and limit of the right to use water." Wyo. Stat. Ann. § 41-3-101.[6] What words could be used to convey more concretely that beneficial use is a quantitative, limiting concept?

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[6] Wyoming's definition of beneficial use is consistent with the quantitative understanding of the concept of beneficial use generally in the western states. See, *e.g.*, U.S. Br. 18 (and cases cited therein) ("the first person to appropriate water for a beneficial use gains a right . . . only to the *extent* of its actual use") (internal quotation marks omitted; emphasis added).

Moreover, the quantity of water that is protected is the amount that was historically consumed. See, *e.g.*, Robert E. Beck & Eugene Kuntz, *Reallocations, Transfers, and Changes*, in *Waters and Water Rights*, at 14-54 (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009) ("An appropriator may not increase, through reallocation or otherwise, the actual historic consumptive use of water to the injury of other appropriators"). It is for this reason that, when transferring a water right, the right is limited to the "historic amount consumptively used," that does not "decrease the historic amount of return flow under an existing use," and that does not "injure in any manner other lawful appropriators." Wyo. Stat. § 41-3-104 (1977); see also *Green River Development Co. v. FMC Corp.*, 660 P.2d 339 (Wyo. 1983); *Basin Electric Power Coop. v. State Bd. of Control*, 578 P.2d 557 (Wyo. 1978).

The reason transfers are limited to the amount historically consumed is to protect downstream users, who are entitled to the continuation of the stream conditions that existed at the time they commenced their appropriations. See, *e.g.*, Sax, et al. at 270-271; *Quigly v. McIntosh*, 103 P.2d 1067, 1072 (Mont. 1940). The Compact incorporates this principle of prior appropriation law in Article V(A) and the definition of "beneficial uses." Like the historic consumptive use doctrine, Article V(A) protects both Wyoming, by allowing it the continued enjoyment of the water that was in actual use in 1950, and Montana, by

preventing Wyoming from expanding its use beyond what was historically consumed (*i.e.*, "depleted") in 1950.

Wyoming does not quarrel with the protections afforded by the no-injury rule or the historic consumptive use doctrine. Wyo. Br. 38-39. Instead, Wyoming argues that it should nonetheless be allowed to increase its depletions to Montana's detriment because once water is in the possession of an appropriator "the public loses the right to make claim to it as long as it remains in the possession of its owner." Wyo. Br. 43. As Montana has explained, however, there is a critical difference between waste water (sometimes referred to as seepage) and return flows. Montana claims rights to return flow, not waste or seepage. The Special Master acknowledges that "once 'seepage' water makes it to a natural waterway . . . most states permit water users to divert and appropriate the water from the waterway." FIR 72. Both Montana and Wyoming law are in accord. See *Rock Creek Ditch & Flume Co. v. Miller*, 17 P.2d 1074, 1077 (Mont. 1933) ("Where vagrant fugitive waters have reached a natural channel, and thus have lost 'their character as seepage, percolating, surface or waste waters,' they serve to constitute a part of the water course, and are subject to appropriation."); *Bower v. Big Horn Canal Ass'n*, 307 P.2d 593, 600, 602 (Wyo. 1957) (recognizing "the importance of protecting water rights based upon return flows" as opposed to waste or seepage); *Fuss v. Franks*, 610 P.2d 17, 20-23 (Wyo. 1980) (finding that plaintiff had

a valid and vested right to water because it was return flow that had reached a natural stream).

In the analogous case of *Steed v. New Escalante Irrigation Co.*, 846 P.2d 1223 (Utah 1993), the court addressed a suit for an injunction by the downstream appropriator to prevent the upstream appropriator from reducing flows by converting from flood to sprinkler irrigation. *Id.*, at 1224. In analyzing the case, the *Steed* court applied the very principles that Montana advocates here. The court denied the injunction because the water at issue was found to be seepage water that did not return to the same stream from which it had been diverted. *Id.*, at 1226-1227. Application of these same principles yields a different result in the present case, however, because Montana claims water that historically has returned to the same stream system from which it was diverted by Wyoming. Compare *id.* with Bill of Complaint, ¶¶ 12-13. Courts that have considered similar issues have found that a water user may not enlarge a senior right by means of a new salvage technique. See *Salt River Valley Water Users' Ass'n v. Kovacovich*, 411 P.2d 201 (Ariz. App. 1966) (denying the expansion of a senior water right achieved by more efficient irrigation methods); *Southeastern Colorado Water Conservancy Dist. v. Shelton Farms, Inc.*, 529 P.2d 1321 (Colo. 1974) (water saved by removing streamside phreatophytes could not be retained because it was relied upon and appropriated by junior users); *R.J.A., Inc. v. Water Users Ass'n of Dist. No. 6*, 690 P.2d 823 (Colo. 1984) (denying expansion of senior water right

to include water saved in draining a 3,000 year old peat bog because the water belonged to the stream and was subject to appropriation).

D. Wyoming's and the United States' Reading of the Compact Would Create an Unworkable Interstate Relationship Contrary to the Purposes of the Compact

One of the purposes of the Compact is to "remove all causes of present and future controversy," but the reading of the Compact by Wyoming and the United States would greatly increase the potential for controversy and create an unworkable interstate relationship. The theory of Article V(A) advanced by the United States and Wyoming would add the burden of continually determining the quantity of water allocated to pre-1950 water rights as they evolve over time. For instance, new controversies would regularly arise between the States over whether pre-1950 water rights had been abandoned or had increased their consumption.[7] In fact, those

[7] The fact that the drafters did not quantify existing rights does not mean that the Compact affords no protection for Montana's rights. See U.S. Br. 14. Rather, the States were driven to produce a workable agreement as early as possible to take advantage of potential federal projects. House Rep. No. 1118, 82d Cong., 1st Sess. (Oct. 10, 1951), at 2, 5; Joint App. 26, 29.

[8] The only recourse for those disputes would be in this Court.

issues would also have to be determined in order to calculate each State's Article V(B) allocation. The need for continual re-quantification of each State's allocation would unavoidably increase controversy to an intolerable degree, contrary to the stated intent.

E. Focus on the Rights of Individual Water Users By Wyoming and the United States is Misplaced

The Compact is an agreement among the States, not among individual water users. Despite generally recognizing this principle, see U.S. Br. 24 n.11, Wyoming and the United States continue to base their arguments on the premise that the Compact "provides enforceable protection to the *pre-1950 water users in each State*," but, apparently, not to the States themselves. *Id.*, at 11. The argument is best summarized by the United States' statement that "the States are . . . bound by the rights of their water users." *Id.*, at 24 n.11.[*] The consequence of the United

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[*] In contrast, in a recent case before this Court, the United States took a divergent view:

> "[I]n an equitable-apportionment action, *the competing States are advancing sovereign interests rather than proprietary interests or interests that derive from individual water users*. That is why those disputes, unlike other types of original action, are 'resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States.'"

(Continued on following page)

States' view is stunning: the allocation among the States would be subject to continual change depending upon the unilateral actions of individual users in both States.

An interstate compact endorsed by congressional consent is in essence a treaty between quasi-sovereign States. See, *e.g.*, *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951). In entering the Compact, Montana was acting in its sovereign capacity. See Art. I(A). And in bringing this case, Montana was protecting its sovereign rights to the water of the Yellowstone River. See, *e.g.*, U.S. Invitation Br. 11-12.

A primary purpose of the Compact was to "provide for an equitable division and apportionment" of the waters of the Yellowstone River and its tributaries. Preamble, FIR, at A-1. But under Wyoming's and the United States' view, no such division and apportionment was made. Rather the allocation is varied based on the unilateral actions of individual water users. Wyoming and the United States thereby take the remarkable position that the relative rights between the quasi-sovereign States are determined by the actions of individuals who generally cannot even be parties to this action. See *New Jersey v. New York*, 345 U.S. 369, 373 (1953) (explaining that

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South Carolina v. North Carolina, No. 138 Orig., *Brief for the United States as Amicus Curiae in Support of Plaintiff's Exceptions* (Feb. 2009) (quoting *Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995)) (emphasis added).

individual water users normally may not participate in interstate water disputes in the original jurisdiction because they have a personal interest only in the "intramural dispute over the distribution of water within the [State]").

The view that the States' Compact rights are dependent on the actions of individual rights is also inconsistent with Article I(B). That Article specifies that the rights of all appropriators in either State "shall be subject to the terms of this Compact." FIR. at A-2 to A-3. This language indicates an intent to subjugate the individual rights to the States' Compact rights, as is consistent with this Court's decision in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). Wyoming dismisses *Hinderlider* as "irrelevant." Wyo. Br. 15 n.3. And the United States takes the radical view that "in this case the States are also bound by the rights of their water users." U.S. Br. 24 n.11. But this is not so. Rather *Hinderlider*, decided during the period when the Yellowstone Compact was being negotiated, explains that a compact apportionment "is binding upon the citizens of each State and all water claimants, even where [as here] the State had granted the water rights before it entered into the compact." *Hinderlider*, 304 U.S. at 106. The Compact should be read in harmony with this principle such that Article V(A) is understood to establish the binding allocation to each State for pre-1950 actual uses.

F. Wyoming's Divertible Flow Argument is Irrelevant

Wyoming argues that the Compact's utilization of the "divertible flow" principle forecloses Montana's Exception. Wyo. Br. 22-31. The description of the Compact as a "divertible flow" compact, however, has no bearing on the issue before the Court. As the Special Master explained, "[b]y the terms of the Compact ... the cumulative divertible-flow approach of Articles V(B) and V(C) applies only to the 'quantity of water subject to the percentage allocations' in Article V(B) – *i.e.*, to new uses." FIR 29 (quoting Compact, Art. V(C)). Wyoming has not excepted to this ruling, and it is now the law of this case to which Wyoming can no longer object. U.S. Br. 12 n.4. Thus, the "divertible flow" principle relied upon by Wyoming does not apply to Article V(A), which is the operative provision at the heart of Montana's Exception.

According to Wyoming, the Yellowstone Compact, unlike the Upper Colorado Compact, does not allocate a "fixed amount of water" for delivery to Montana. Wyo. Br. at 20. But contrary to Wyoming's assertion, Montana does not claim that Wyoming is obliged to deliver a fixed quantity of water to Montana under Article V(A). In times of shortage, Wyoming has no obligation to curtail its own pre-1950 actual use (depletions). However, when water is short, and Montana is not receiving its full Article V(A) allocation, Wyoming violates the Compact by depleting more water than was in actual use in 1950. That proposition has nothing to do with the selection of

"divertible flow" over "consumption" as the basis for allocating the unused and unappropriated water in Article V(B). Nor does the distinction advocated by Wyoming change the fundamental principle that all of the waters of the Tongue and Powder Rivers were apportioned and allocated by the Compact and that one State may not deplete the waters allocated to another State.

II. Wyoming's Duty to Comply With Montana's Pre-1950 Entitlement is Independent of Actions by Montana or Its Water Users

The Special Master has recommended denial of Wyoming's Motion to Dismiss, but has conditioned Montana's relief under the Compact upon exhaustion of intrastate remedies. FIR 27-28, 89. This recommendation has the potential to affect future litigation and administration of the Compact insofar as it allows Wyoming to require Montana to prove certain facts prior to Wyoming being required to meet its delivery obligations under Article V(A). Montana has taken exception to this ruling because Wyoming's Compact obligations are not dependent on the actions of individual users, priority administration in Montana, or any other action or lack of action by Montana. Nonetheless, Montana is amenable to the United States' suggestion that a ruling be deferred.

A. Montana Has Not Waived Its Exception

In Case Management Order No. 2, the Special Master invited the parties to file letter briefs addressing corrections or clarifications to the Memorandum Opinion of June 2, 2009. The Order directed that the letter brief "is not an opportunity to rebrief Wyoming's Motion to Dismiss, and the letter briefs should not cover matters already addressed in the briefs filed on that motion." 6/12/09 Order; see also 6/11/09 Tr. 18, 20-21. The Special Master limited the parties' letter briefs to corrections or clarifications of fact or law, including state law as discussed in the Memorandum Opinion. Montana interpreted this instruction to mean that the Special Master did not want substantive argument on his recommendations, but rather, wanted to ensure his discussion of the law and facts was accurate. The wording of the Special Master's invitation to file the letter briefs refutes Wyoming's assertion that Montana waived its right to bring an exception.

Moreover, in response to the Special Master's suggestion that Montana must first resolve water shortages among its own water users, Montana submitted comments stating: "The issue is compact rights between States, not relative rights of individual water users," and "Wyoming is required by the Compact to comply with Article V(A) without a specific call from Montana." See Comments of Montana on the Draft First Interim Report of the Special Master (Jan. 1, 2010).

B. The Plain Language of the Compact Does Not Require Montana to Exhaust Intrastate Remedies

The Special Master's conclusion finds no support in the text of the Compact. To the contrary, Article V(A) requires that Montana's pre-1950 rights "continue to be enjoyed," and the Special Master has correctly concluded that this language places an affirmative obligation on Wyoming to curtail its post-1950 uses when necessary to deliver sufficient water at the border to supply Montana's pre-1950 entitlement. There is no specific language imposing an obligation to exhaust intrastate remedies.

Perhaps recognizing the absence of a textual anchor in the Compact for their argument, Wyoming and the United States fall back on the mistaken conclusion, discussed above, that the Compact affords rights to individual water users and that "when . . . an intrastate remedy is available for the injury to a Montana water user, that user cannot attribute his injury to Wyoming, or to a Compact breach." U.S. Br. 31. As Montana demonstrates above, the premise of this argument is simply wrong. The Compact creates rights among States, not individual water users.

C. The Allocation is Self-Executing and Does Not Depend on Actions of Individual Users or Administration in the Downstream State

The Compact is a federal law designed to protect existing uses in all three signatory states, and to allocate any leftover water of the Interstate Tributaries on a percentage basis. Article V(A) says nothing about how existing rights are administered within each State; its only requirement is that each State will not interfere with the supply necessary to satisfy pre-1950 users. The Special Master recognized this obligation regarding pre-1950 rights in his First Interim Report by stating: "Protection of pre-1950 appropriations under Article V(A) . . . requires Wyoming to ensure on a constant basis that water uses in Wyoming that date from after January 1, 1950 are not depleting the waters flowing into Montana to such an extent as to interfere with pre-1950 appropriative rights in Montana." FIR 29.

Wyoming's obligation to deliver a supply sufficient to meet pre-1950 uses in Montana is not dependent on Montana having employed any particular method of administration or priority system within its borders. By the same token, Montana may not insist that Wyoming employ any particular method of administration or priority system to satisfy its compact obligations. Wyoming may release storage water, curtail certain uses, limit groundwater pumping, or choose whatever means it sees fit to ensure that Montana's pre-1950 needs are met. But nothing

in the Compact requires Montana, as a downstream State, to pursue intrastate remedies before it may enforce its right to receive water under the Compact.

CONCLUSION

Montana's Exception should be granted in its entirety. In the alternative, the Court may simply wish to defer its ruling on one or both issues, so long as Montana's rights are preserved in the meantime. Following this Court's consideration, the Court should remand the case to the Special Master for further proceedings.

Respectfully submitted,

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